No. 18-____

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has not yet addressed Exemption 4 of the Freedom of Information Act, which protects from disclosure all "confidential" private-sector "commercial or financial information" within the Government's possession. 5 U.S.C. § 552(b)(4). The Circuits, however, have adopted a definition of "confidential" that departs from the term's ordinary meaning, holding that this exemption applies only if disclosure is "likely * * * to cause substantial harm to the competitive position of" the source of the information. *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit fashioned this atextual test from its own sense of FOIA's purposes based on witness testimony in a legislative hearing about a predecessor bill from a prior Congress. The amorphous test has produced at least five different circuit splits as the Circuits have grappled with what constitutes a likelihood of substantial competitive harm. The questions presented are:

1. Does the statutory term "confidential" in FOIA Exemption 4 bear its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure—which would resolve at least five circuit splits?

2. Alternatively, if the Court retains the substantial-competitive-harm test, is that test satisfied when the requested information could be potentially useful to a competitor (as the First and Tenth Circuits have held), or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share (as the Ninth and D.C. Circuits have held, and as the Eighth Circuit required here)?

PARTIES TO THE PROCEEDING BELOW

Petitioner Food Marketing Institute was an intervenor-defendant in the U.S. District Court for the District of South Dakota and the appellant in the U.S. Court of Appeals for the Eighth Circuit.

The U.S. Department of Agriculture was the defendant in the district court but was not a party to the Eighth Circuit appeal.

Respondent Argus Leader Media was the plaintiff in the district court and the appellee in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Food Marketing Institute (FMI) is a voluntary trade organization, with headquarters in Arlington, Virginia, that represents almost 1,000 retail and wholesale food sales members operating nearly 33,000 retail food stores across the United States and in several foreign countries. FMI has no parent corporation, and no publicly held corporation has an ownership interest in FMI.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Food Marketing Institute respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (App. A) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 889 F.3d 914 (8th Cir. 2018). The court of appeals' judgment (App. B) and order denying rehearing *en banc* (App. O) are unreported.

The district court's memorandum opinion and order (App. C) is reported as *Argus Leader Media* v. *U.S. Department of Agriculture*, 224 F. Supp. 3d 827 (D.S.D. 2016). The district court's judgment (App. D) and order granting FMI's motion to intervene (App. J) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May

8, 2018. The court denied rehearing *en banc* on July 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act, 5 U.S.C. § 552, provides:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (8)(A) An agency shall—
>
> (i) withhold information under this section only if—
>
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption describe in subsection (b); ***
>
> * * *
>
> (b) This section does not apply to matters that are—
>
> * * *
>
> (4) trade secrets and confidential or financial information obtained from a person and privileged or confidential;
>
> * * *.

5 U.S.C. § 552(a)(8)(A)(i)(I), (b)(4).

PRELIMINARY STATEMENT

The private sector must disclose substantial amounts of information to the Government, including the information at issue here—redemption data from retailers participating in the Supplemental Nutrition Assistance Program, or SNAP. The Freedom of Information Act, however, protects significant portions of private-sector information from public release. This case turns exclusively on FOIA Exemption 4, which bars disclosure of "trade

secrets and commercial or financial information" that is "confidential." 5 U.S.C. § 552(b)(4). Participating SNAP retailers jealously guard store-level SNAP data from competitors and hold such data highly confidential. Unable to obtain this confidential data from any public source, Argus Leader sought to obtain it through FOIA.

But rather than give "confidential" its ordinary meaning, the Eighth Circuit followed a test the D.C. Circuit created based on a selective reading of legislative history. According to the court of appeals, "confidential" means that the release of the information would "likely * * * 'cause substantial harm to the competitive position'" of those whose data is disclosed. App., *infra*, 3a (quoting a series of Eighth Circuit cases that ultimately trace to *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

The Eighth Circuit is hardly alone in having abandoned FOIA's plain text and permanently deferred instead to *National Parks*. But that D.C. Circuit decision came from a very different era of statutory construction. *National Parks* made no pretense of focusing on the statutory text. It instead decided that, despite its plain text, Exemption 4 did not encompass all confidential financial and commercial information obtained from a person, then supported that assumption with snippets of legislative history—witness testimony at hearings on a predecessor bill from a prior Congress. The court thus transformed the common, broad ordinary meaning of "confidential" into the far narrower and more fact-bound concept involving whether release would "substantial[ly]" harm a "competitive position." 498 F.2d at 770.

This Court has not yet construed Exemption 4, but the plain-text approach to FOIA that the Court has repeatedly employed cannot coexist with *National Parks*. The *National Parks* definition of "confidential" directly

conflicts with this Court's ordinary-meaning construction of that very statutory term in another nearby FOIA exemption. See *U.S. Dep't of Justice* v. *Landano*, 508 U.S. 165, 173 (1993) (giving "confidential" in FOIA Exemption 7 its ordinary meaning based on dictionary definitions).

The Circuits' fidelity to this amorphous, judicially-created test from *National Parks* has spawned a spate of circuit splits, as the Circuits repeatedly disagree about the elements required to show a likelihood of substantial competitive harm. See *infra* pp. 24-30. This substantial-competitive-harm test requires FOIA requesters, the Government, the parties whose data will be revealed, and the courts to expend considerable energy speculating about the future effects of releasing a particular set of data. Yet the test still generates disparate outcomes among (and within) the Circuits despite the vast resources required to implement it.

This Court granted petitioner's application to recall the Eighth Circuit's mandate and stay its judgment. App., *infra*, 82a. That stay prevented this case from becoming moot and depriving the Court of an opportunity to—at long last—consider Exemption 4's text. The very fact that circuit splits have resulted from *National Parks* illustrates why the first question presented warrants consideration: the nebulous and erroneous substantial-competitive-harm test is itself the root of those splits. But even if the Court retains that test, the resulting division among the Circuits still requires resolution of the second question presented and justifies reversal here. Either way, the Court should grant certiorari and eliminate the vast uncertainty that envelops FOIA Exemption 4.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Supplemental Nutrition Assistance Program (SNAP)—formerly, the Food Stamp Program—is a

federal program that provides nutritious food to low-income families through normal economic channels. 7 U.S.C. § 2011. USDA receives and maintains a record when a SNAP recipient makes an eligible purchase at a participating store. App., *infra*, 2a. The program's scope is considerable. In June 2018 alone, over 39 million individuals received SNAP benefits.[1]

USDA releases monthly compilations of SNAP redemption data. Anyone can view national, state, and even congressional-district level SNAP costs on USDA's website.[2] But USDA does not disclose data regarding the amount of SNAP redemptions at individual stores, and retailers have participated in the program with the understanding that store-level data would be kept confidential. App., *infra*, 88-89a.

B. Respondent Argus Leader is a newspaper in Sioux Falls, South Dakota. In 2011, an Argus Leader reporter filed a FOIA request for SNAP data. App., *infra*, 25a. For each SNAP retailer nationwide, Argus Leader requested the store identifier, name, address, store type, and total SNAP sales on an annual sales basis for 2005 to 2010. *Ibid.* USDA timely released most of the requested information but withheld the store-level SNAP sales data. *Id.* at 26a.

II. Proceedings Below

A. The lawsuit and initial litigation

After USDA refused to provide store-level data, Argus Leader brought suit in the U.S. District Court for the District of South Dakota. App., *infra*, 10a. USDA asserted several FOIA exemptions, including Exemption 4. The district court granted summary judgment for USDA

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[1] USDA, Supplemental Nutrition Assistance Program (Sep. 24, 2018), https://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf.

[2] SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Oct. 1, 2018).

based on Exemption 3—that the information was exempted from disclosure by statute. *Ibid.* The Eighth Circuit reversed as to Exemption 3. *Ibid.* Exemption 3 plays no further role in this case.

B. Proceedings in the district court

1. On remand, USDA again pressed its argument that FOIA's Exemption 4 protects store-level SNAP sales data. App., *infra*, 10a. That provision exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit has adopted the D.C. Circuit's approach to whether information is "confidential" from *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under that test, Exemption 4's applicability turns on whether disclosure would likely cause substantial competitive harm. App., *infra*, at 16a. After denying USDA's summary-judgment motion, *id.* at 10a, the district court held a two-day bench trial to assess the competitive harms associated with releasing the requested data, *id.* at 11-13a & 87a.

USDA presented multiple industry witnesses who testified that retailers consistently and strenuously protect the requested information from their competitors. App., *infra*, 11a-12a & 88a-89a.[3] Competition in the food-retail industry is fierce and profit margins are narrow, forcing retailers to rely on high sales volumes for profitability. *Id.* at 12a & 17a. The witnesses explained how releasing store-level data would directly threaten stores' competitive positions.[4] Argus Leader presented no fact witnesses

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[3] Witnesses came from a supermarket chain, a large department store, a wholesale grocer, a convenience store, and the National Grocers Association. App., *infra*, 11a-12a.

[4] For example, USDA's witnesses testified that with this information, rivals could target an existing store's customers, decide where to build

at trial.

Expert testimony corroborated the fact witnesses' concerns. USDA's expert was Bruce Kondracki, the vice president of a consumer-research firm that performs market analysis, site location, and forecasting research in the food industry. App., *infra*, 13a. Kondracki explained that if retailers' SNAP data were released, that data could be used to target an existing store's customers, and to improve the accuracy of model forecasts used by competitor stores to determine where to add locations. *Ibid.* Argus Leader presented two expert witnesses, neither of whom works in the food-retail industry. These witnesses acknowledged the competitive nature of the industry, but maintained that the release of store-level SNAP data was likely to have only limited competitive effect. *Id.* at 12a-13a.

2. Following the bench trial, the district court entered judgment in favor of Argus Leader. App., *infra*, 22a. Despite finding, in accordance with all the testimony, that "competition in the grocery business is fierce," *id.* at 17a, the district court concluded that Exemption 4 did not apply because "any potential competitive harm from the release of the requested SNAP data is speculative at best," *id.* at 18a. Given the Eighth Circuit's adoption of *National Parks*, this level of competitive harm did not, in the district court's view, rise to the level where the SNAP data could be treated as "confidential" under Exemption 4. *Id.* at 20a.

3. USDA had already pursued this litigation for six years. Shortly after the district court issued its ruling, USDA informed retailers that it intended to release the store-level SNAP data, signaling it would not appeal.

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new stores, and determine a retailer's overall sales—all of which could ultimately cut into the SNAP retailers' profits. App., *infra*, 11a-13a, 18a.

App., *infra*, 72a. Petitioner Food Marketing Institute (FMI)—a trade association whose members operate tens of thousands of retail food stores, many of which participate in SNAP—moved to intervene and appeal the judgment. *Id.* at 72a-73a.

The district court granted FMI's motion to intervene and stayed its judgment pending appeal. App., *infra*, 77a-78a. The district court observed that whether Exemption 4 applies to store-level SNAP sales data "appears to be [an issue] of first impression in the Eighth Circuit" and that, "[b]ecause there is not a clearly established answer to this issue, FMI could succeed in an appeal." *Id.* at 76a.

C. Proceedings in the court of appeals

The Eighth Circuit affirmed. FMI urged reversal of the district court's opinion on the ground that "confidential" in Exemption 4 should be given its plain meaning, consistent with this Court's precedents. The unrebutted evidence showed that retailers keep secret and closely guard their store-level data. App., *infra*, at 11a-12a & 88a-89a. The court of appeals, nevertheless, disposed of this argument in a single footnote: the court would not consider the plain meaning of the word "confidential" because doing so purportedly "would swallow FOIA nearly whole," and would conflict with what the court of appeals believed to be this Court's guidance that FOIA exemptions should be narrowly construed. App., *infra*, 4a n.4.

FMI separately urged reversal on the basis that disclosing the requested information would result in sufficient competitive harm to trigger Exemption 4's protection under even the atextual *National Parks* test. But like the district court, the panel reasoned that while the requested data might make models marginally more accurate, the evidence did not support a finding that "this marginal improvement in accuracy is likely to cause *substantial* competitive harm." App., *infra*, 5a. The panel

emphasized that even if there was a "likelihood of commercial usefulness"—in other words, that third parties indeed could exploit information that their competitors had confidentially submitted to the Government—that was insufficient to trigger Exemption 4 because it was "not the same as a likelihood of substantial competitive harm." *Ibid.* The panel did not address the precedents from other Circuits that FMI had relied on in support of its position. See *id.* at 5a-6a.[5]

The Eighth Circuit denied both FMI's petition for rehearing *en banc*, App., *infra*, 85a-86a, and its motion to stay issuance of the mandate, *id.* at 79a-80a.

D. This Court's recall and stay of the Eighth Circuit's mandate

FMI filed an application with this Court to recall the Eighth Circuit's mandate and stay the judgment, arguing that all of the recall-and-stay factors were satisfied: (1) there was a reasonable probability the Court would grant certiorari; (2) there was a fair prospect that the Court would reverse the Eighth Circuit; (3) absent a stay, FMI's members would suffer irreparable harm; and (4) the balance of equities favored a stay.

Justice Gorsuch granted a temporary stay on August 9, 2018, and requested a response from Argus Leader. App., *infra*, 81a. After receiving the parties' submissions, Justice Gorsuch referred the application to the Court, which issued an order on August 29, 2018 joined by five Members of the Court that recalled the Eighth Circuit's mandate and stayed its judgment pending resolution of

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[5] The panel did, however, seek to distinguish another Eighth Circuit precedent, *Madel* v. *U.S. Department of Justice*, 784 F.3d 448, 451 (8th Cir. 2015). While the panel below acknowledged that the issues here "appear to mirror" those in *Madel*, it believed a different result was warranted because the *Madel* data was "not analogous to the data in this case." App., *infra*, 6a.

this petition. App., *infra*, 82a. The Eighth Circuit issued an order to the same effect. *Id.* at 83a-84a.

REASONS FOR GRANTING THE PETITION

National Parks' erroneous construction of "confidential" in FOIA Exemption 4 has been embraced by virtually all Circuits, but it conflicts with this Court's guidance about other FOIA exemptions. Bringing Exemption 4 into conformity with the rest of FOIA would independently justify review, particularly as there appears to be no real likelihood that the Circuits themselves will do so. *National Parks* has also generated subsidiary circuit splits that justify certiorari. The two questions presented are mutually reinforcing: Since *National Parks* is the source of the subsidiary circuit splits, disapproving *National Parks* will cause these circuit splits to vanish.

I. THE COURT SHOULD GRANT REVIEW OF THE FIRST QUESTION PRESENTED TO RESTORE FOIA'S PLAIN TEXT (AND ELIMINATE MULTIPLE CIRCUIT SPLITS)

This Court has repeatedly reviewed FOIA exemption cases, recognizing the national importance of properly enforcing *both* of Congress's directives in FOIA: to release information for public transparency *and* to protect some information from widespread public disclosure.[6] But Exemption 4 has thus far escaped the Court's review. That provision protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); see *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 383

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[6] This Court has previously examined Exemptions 2, 3, 5, 6, and 7. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (Exemption 2); *Baldrige* v. *Shapiro*, 455 U.S. 345, 359 (1982) (Exemption 3); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (Exemption 5); *U.S. Dep't of State* v. *Wash. Post Co.*, 456 U.S. 595, 598 (1982) (Exemption 6); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 160 (2004) (Exemption 7).

(2015) (Thomas, J., dissenting from denial of certiorari) ("We have never interpreted Exemption 4[].").[7]

This Court's guidance on Exemption 4 is badly needed now. Despite occasional articulated misgivings, the Circuits have felt constrained by precedent and the goal of uniformity to ignore Exemption 4's unambiguous language, transforming the word "confidential" into something far from its ordinary definition.[8] Restoring this ordinary definition, in turn, would resolve multiple second-order circuit splits caused by the Circuits' attempts to give meaning to the convoluted and atextual *National Parks* test. Certiorari review of the first question presented is thus warranted, as resolving this antecedent question will make the subsidiary circuit splits disappear. See, *e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2559-2560 (2015) (eliminating "numerous splits among the lower federal courts" regarding the application of the Armed Career

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[7] All citations to *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383 (2015), in this Petition are to Justice Thomas's dissent from denial of certiorari (joined by Justice Scalia). No opinion or other dissent was issued by the Court or its Members.

[8] Interpretive difficulties have not plagued other parts of Exemption 4. The terms "commercial or financial" have been given their ordinary meaning. *E.g.*, *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("[W]e have consistently held that the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings."). The phrase "obtained from a person" has rarely attracted interpretive attention, given its obvious distinction with *government*-generated information. See Department of Justice Guide to the Freedom of Information Act 271 (2009) https://www.justice.gov/oip/foia_guide09/exemption4.pdf (observing that the "obtained from a person" criterion "is quite easily met in almost all circumstances") (hereinafter "DOJ FOIA Guide"). There is no dispute in this appeal that the information at issue is "commercial or financial information obtained from a person" as required by Exemption 4. App., *infra*, 2a & n.2.

Criminal Act by resolving the antecedent question that the Act's residual clause was unconstitutionally vague).

A. *National Parks'* substantial-competitive-harm test was wrong and should be replaced with the ordinary meaning of "confidential"

1. *The Circuits have developed an entrenched and atextual interpretation of "confidential" based on vague legislative history*

a. Lower courts started off on the wrong track by adopting an erroneous test for Exemption 4 initially fashioned by the D.C. Circuit in *National Parks*:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d at 770 (footnote omitted).

National Parks came from an era when most courts were less than rigorous about statutory text—and *National Parks* exemplifies this approach. The opinion made no attempt to base its test on the plain-text definition of "confidential." Rather, the D.C. Circuit simply replaced the plain text with a legislative-purpose test based on an especially weak form of legislative history—witness testimony at a hearing that was actually about a predecessor bill from a prior Congress.

National Parks began by acknowledging that, "[i]n the past," interpretation of Exemption 4 had been "guided by" a Senate Report excerpt stating: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or

other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." 498 F.2d at 766 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Harmless enough, but the opinion then declared that "[a] court must *also* be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767 (emphasis added).

The court purported to find this legislative purpose in various excerpts from additional Senate and House reports, and statements made during a Senate committee hearing. *Id.* at 767-770. The bill under consideration—"the predecessor of the bill which became law," *id.* at 768—contained *no* exemption for trade secrets or commercial or financial information, and several witnesses testified to the necessity of such an exemption. In particular, the court observed that during hearings several witnesses urged an exemption that would "protect[] persons who submit financial or confidential data to government agencies from the competitive disadvantages which would result from its publication." *Ibid.* Based on this statement, the court equated the statutory term "confidential" (the term used in the later bill that became FOIA) with "likely to cause substantial harm to his competitive position." *Id.* at 770.[9]

Of course, the text Congress actually enacted says nothing about "competitive harm." Exemption 4 exempts *all* "confidential" commercial or financial information obtained from a person, without exception. 5 U.S.C.

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[9] The D.C. Circuit also held, based on the same legislative history excerpts, that information may be "confidential" based on the *government's* interest (rather than private interests), for instance "if disclosure of the information is likely * * * to impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770. It "express[ed] no opinion as to whether other governmental interests are embodied in this exemption." *Id.* at n.17.

§ 552(b)(4). In *National Parks*, the D.C. Circuit substituted alternative language that was narrower than what Congress actually adopted; it took one stated problem that might have motivated Congress to act and assumed that, once alerted to the problem, Congress addressed *only* that problem despite choosing broader language. And even if that statutory revision were justifiable, the court did not explain why a showing of *substantial* competitive harm was required.

Since *National Parks*, the Circuits have fallen in line behind this atextual Exemption 4 test, and there is no indication they will return to FOIA's plain text. At least ten Circuits have embraced the *National Parks* test, and an eleventh has applied it in an unpublished decision; none has rejected it.[10]

b. But *National Parks* has attracted eminent critics. D.C. Circuit Judge Randolph, joined by Judge Williams, decried that test as "fabricated, out of whole cloth." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), *vacated*, 942 F.2d 799 (1991). Judge Randolph pointed out that under "ordinary usage," the term

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[10] See, *e.g.*, *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor*, 220 F.3d 153, 167 & n. 24 (3d Cir. 2000); *Acumenics Research & Tech.* v. *U.S. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Cont'l Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 35 (5th Cir. 1975); *Gen. Elec. Co.* v. *U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402-1403 (7th Cir. 1984); *Madel*, 784 F.3d at 452; *Pac. Architects & Eng'rs* v. *U.S. Dep't of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson* v. *Dep't of Health & Human Servs.*, 907 F.2d 936, 946 (10th Cir. 1990); *Nat'l Parks*, 498 F.2d at 770 (D.C. Cir.). The Eleventh Circuit has applied *National Parks* in an unpublished decision. See *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284 (11th Cir. 2007).

"confidential" means "conveyed [and] acted on * * * in confidence" and "not publicly disseminated." *Ibid.* (quoting Webster's Third Int'l Dict. 476 (1981)). He further criticized the judicially-created "substantial harm test" on the grounds that "[i]nformation not customarily revealed to the public is no less confidential when disclosing it would cause only discomfort rather than objectively measurable harm." *Id.* at 948. "If this were a question of first impression," Judge Randolph wrote, "I would apply the common meaning of 'confidential' and reject this test, which has spawned a good deal of litigation including this case, now about to make its third trip to the district court." *Ibid.*

Judge Randolph's criticism led the D.C. Circuit to rehear *Critical Mass*—this time *en banc*—and reconsider *National Parks*. *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) *(en banc)*. But the 7-4 majority opinion in *Critical Mass* ultimately retained the "well established" *National Parks* test: "Whatever our individual opinions as to the merits of the two-part test, we accept the wisdom of Justice Brandeis's observation, some sixty years ago, that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Id.* at 877 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)). (As described *infra* pp. 24-30, even this defense of *National Parks* was mistaken—as time has shown, courts' attempts to parse the D.C. Circuit's words and predict whether each tranche of requested information is "likely" to cause "substantial competitive harm" has led to unpredictable results and multiple circuit splits.)

The *en banc* D.C. Circuit also attempted to "correct some misunderstandings as to [the test's] scope and application," *id.* at 875, but that effort only caused further confusion. It reaffirmed that the *National Parks* substantial-competitive-harm test applies to information that parties

are *required* to submit to the government. *Id.* at 880. Information *voluntarily* provided, on the other hand, is protected by Exemption 4 so long as it "is not customarily release[d] * * * to the public"—the definition of confidentiality the court had embraced prior to *National Parks*. *Ibid.* The statute itself recognizes no such distinctions, and the court made no pretense to the contrary. The only supporting authorities for this modified test were quotes from *National Parks*' own summary of Exemption 4's legislative history. *Id.* at 877-878 (quoting "observations and conclusions" from *National Parks*). Additional inconsistencies have appeared because not all courts have adopted these variations. *See infra* p. 28-29.

In 2015, two Members of this Court joined *National Parks*' critics. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in *New Hampshire Right to Life*, 136 S. Ct. at 385, a case that in part involved FOIA Exemption 4. This Court, Justice Thomas observed, has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* at 383. Notably, the federal Government itself—the party opposing certiorari in *New Hampshire Right to Life*—did not defend Exemption 4's interpretation under those precedents. It instead conceded "that every court that has adopted the *National Parks* definition of 'confidential' information has turned its back on the statutory text." *Id.* at 385 n.*. Denying certiorari, Justice Thomas lamented, "perpetuate[d] an unsupported interpretation of an important federal statute and further muddie[d] an already amorphous test." *Id.* at 385.

The decision below confirms that the Circuits have not course corrected in light of Justice Thomas's and other jurists' criticisms. Given *National Parks*' entrenchment, this Court's review is necessary to restore the plain-text directive that Congress gave in Exemption 4 to protect all confidential business information from FOIA disclosure.

2. National Parks *contravenes this Court's precedents that require plain-text interpretations of FOIA exemptions*

Both as a matter of this Court's general statutory-construction principles and its specific FOIA case law, "confidential" should be given its ordinary meaning as information that is held in confidence and not publicly disseminated. In fact, the Court *already has* given it that meaning when it considered a separate FOIA exemption using that word.

a. This Court has repeatedly instructed that all statutory construction begin with the text and go no further when the statutory language is plain. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis."). Courts "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citation omitted); *accord FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994).

Despite this Court's repeated instructions regarding statutory interpretation, the Court has had to rescue other FOIA exemptions from atextual glosses on multiple occasions. See, *e.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (giving "personnel" in Exemption 2 its plain meaning); *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001) (seeking "textual justification" for proposed interpretation of Exemption 5); *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to "read into the FOIA [language] that Congress did not itself provide"); *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984) ("We * * * simply interpret Exemp-

tion 5 to mean what it says."); cf. *N.H. Right to Life*, 136 S. Ct. at 383 (describing the Court's repeated practice of "reject[ing] interpretations of * * * FOIA exemptions that diverge from the text").

b. Under the canons of construction, interpreting Exemption 4 should be straightforward. "Confidential" has an ordinary, commonly understood meaning, and Congress did not provide a different definition. Information is confidential if it is "[c]ommunicated in confidence; of the nature of confidence; secret," a "communication in confidence of private matters,"[11] or "intended to be held in confidence or kept secret."[12] See also, *e.g.*, *Critical Mass*, 931 F.2d at 947 (Randolph J., concurring) (noting that under the "ordinary usage" of the term, a report is "confidential" if it is "not publicly disseminated" or "conveyed [and] acted on * * * in confidence" (citing Webster's Third Int'l Dict. 476 (1981))).

Contrary to the *National Parks* formulation, the ordinary meaning of confidential contains no sense of *harm*, let alone harm that is "likely," "substantial," and "competitive." The D.C. Circuit erroneously imported such concepts into the interpretation of "confidential" based on testimony before congressional committees, not the statute's actual words. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991) (where a statute contains an unambiguous word, the Court will not "permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process").

c. Nor should it even be an open question that

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[11] Webster's Second Int'l Dictionary 560 (1957); see also Black's Law Dictionary 370 (4th ed. 1951) ("private; secret"); Oxford English Dictionary, http://www.oed.com/ ("2. Of the nature of confidence; spoken or written in confidence; characterized by the communication of secrets or private matters") (last visited Oct. 9, 2018).

[12] Webster's Seventh New Collegiate Dictionary 174 (1963).

Congress used "confidential" in its ordinary sense. Congress used the same word in Exemption 7, just a few paragraphs after Exemption 4, and this Court authoritatively gave that word its ordinary meaning in *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 173 (1993). For at least three reasons, *Landano* should be dispositive of this question.

First, the Court specifically gave Exemption 7's use of "confidential" its ordinary meaning, observing that the word "is not limited to complete anonymity or secrecy." *Ibid.* (citing Webster's Third New Int'l Dict. 476 (1986)).[13] "A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." *Ibid.* Consequently, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 174.

Second, the Court specifically *rejected* an alternative definition of the term that "relie[d] extensively on legislative history" and, in particular, on testimony given before Senate and House committees. *Id.* at 178. The Court emphasized that, "[h]ad Congress meant to create" the particular rule advocated in the legislative testimony, "it could have done so much more clearly." *Ibid.* In other words, this Court accepted what *National Parks* rejected (plain text), and rejected what *National Parks* embraced (legislative history to generate an unusual interpretation).

Third, "[a] term appearing in several places in a

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[13] Exemption 7 permits the government to withhold information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D).

statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The Court has in fact applied this very principle *to FOIA exemptions*. *Milner* used the appearance of "personnel" in Exemption 6—"just a few short paragraphs down" from Exemption 2—to bolster its interpretation of the same word in Exemption 2: giving "personnel" its ordinary meaning. 562 U.S. at 570. Exemption 7's use of "confidential" is likewise "just a few short paragraphs down" from Exemption 4's use of that term, and it should likewise be given its ordinary meaning.

d. The flawed *National Parks* test for "confidential[ity]" in Exemption 4 has also had the collateral consequence of marring that exemption's separate "trade secrets" prong. After the D.C. Circuit fabricated the substantial-competitive-harm test to define "confidential," the same court in *Public Citizen* was confronted with how to distinguish confidential commercial or financial information from "trade secrets." *Pub. Citizen Health Research Grp.* v. *Food & Drug Admin.*, 704 F.2d 1280, 1288-1289 (D.C. Cir. 1983). *Public Citizen* acknowledged that a broad common-law definition of trade secrets was widely accepted in other areas of the law. *Ibid.* But that broad definition overlapped—perhaps entirely—with *National Parks*' judicially-created definition of "confidential," and would "render[] meaningless the second prong of Exemption 4." *Id.* at 1289.

To avoid this surplusage problem, *Public Citizen* gave "trade secret" a narrow meaning: "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" that has a "direct relationship" to the productive process. *Id.* at 1288. As the Department of Justice has recognized, this holding "represented a distinct departure from what until

then had been almost universally accepted by the courts—that a 'trade secret' encompasses virtually any information that provides a competitive advantage."[14]

Information qualifying as a trade secret for a protective order or under the Uniform Trade Secret Act, therefore, may well *not* be a trade secret for FOIA purposes, according to the D.C. Circuit—and all to accommodate *National Parks*' idiosyncrasy.

3. Giving "confidential" its ordinary meaning is consistent with FOIA's purposes

The Eighth Circuit refused to give "confidential" its ordinary meaning, disposing of FMI's plain-text argument with a conclusory footnote that reading the exemption plainly would "swallow FOIA nearly whole." App., *infra*, 4a n.4.[15] But a plain-text reading of a FOIA exemption does not undermine the statute's purpose or violate congressional intent. As noted by this Court in *Milner*, such an approach does the opposite: it "gives the exemption the [meaning] Congress intended." 562 U.S. at 572.

a. FOIA unquestionably promotes broad disclosure of government information, but not without limits. "FOIA reflects a general philosophy of full agency disclosure *unless information is exempted under clearly delineated*

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[14] DOJ FOIA Guide at 264.

[15] Exemption 4 could not swallow FOIA whole; it applies only to a subset of information that can be requested from the Government, which invokes Exemption 4 in fewer than 2% of annual FOIA request denials. Office of Information Policy, U.S. Department of Justice, *Summary of Annual Reports for Fiscal Year 2017* at 8, available at https://www.justice.gov/oip/page/file/1069396/download (last visited Oct. 10, 2018). But many parties, litigants, and agencies are still affected—the less than 2% of FOIA denials accounts for approximately 4,700 requests for untold numbers of documents. See *id.* at 7 (reporting that 302,658 FOIA requests were released in part (and thus denied in part) and 38,749 FOIA requests were denied in full).

statutory language." *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (emphasis added) (citation omitted). "When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004).

Simplistic arguments about general purpose are possible for *all* statutes. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). FOIA's exemptions reflect Congress's determination of how far is far enough. Exemption 4 is not an inconvenience; it is the law and must be interpreted accordingly. Cf. *Landano*, 508 U.S. at 173 (rejecting a narrow definition of "confidential"); *Weber*, 465 U.S. at 798 ("The plain language of [Exemption 5] itself, as construed by our prior decisions, is sufficient to resolve the question presented.").

Regardless, nothing suggests that FOIA will cease to serve its larger purpose if its terms are applied as written. FOIA's purpose, in part, is to contribute to "public understanding of the operations or activities *of the government*." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (citation omitted). Exemption 4 serves a limited but important role: it shields from disclosure certain information that was "obtained from a person"—*i.e.*, non-governmental third parties. 5 U.S.C. § 552(b)(4).[16] Imposing extra-

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[16] See *Bd. of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (concluding Exemption 4

textual restrictions on what Exemption 4 means by "confidential" does little if anything to improve public understanding of the Government's activities—and it does so at the expense of those who do business with the Government.

b. Restoring "confidential" to its ordinary meaning would also create a workable standard. The amorphous substantial-competitive-harm standard established by *National Parks* has, as described below, resulted in extensive litigation and unpredictable and inconsistent results. See *infra* pp. 24-30. Without a more predictable standard, private parties cannot make an informed decision about whether to participate in government programs that require them to disclose their confidential information to government agencies; nor do they (or the agencies in possession of their information) have the information they need to properly present their position at trial if a FOIA request is made for the submitted information. Restoring the ordinary meaning of "confidential" would allow a readier assessment of whether the data was confidentially held and not otherwise publicly disseminated by its source.

c. *National Parks* should not survive merely because of its entrenchment in the lower courts. In many contexts, including FOIA, this Court has rejected similarly longstanding but atextual statutory interpretations. In *Milner*, for example, the Court addressed FOIA Exemption 2, which shields from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Court abrogated extra-textual tests that the D.C. Circuit had developed, and replaced them with a plain-text interpretation of the exemption that was based on dictionary definitions of

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is "restrict[ed]" to information that has "not been generated within the Government").

"personnel." 562 U.S. at 579-580 (abrogating *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*)). "Our consideration of Exemption 2's scope starts with its text," the Court explained—regardless of how entrenched an atextual decision had become. *Id.* at 569.

A proper understanding of Exemption 4 would have required a different outcome here. Argus Leader has never disputed that the requested data is not publicly available and is carefully safeguarded by retailers. This should not have been a close case, let alone one requiring a two-day trial.

B. Rejecting *National Parks*' substantial-competitive-harm test would eliminate at least five circuit splits

The *National Parks* test for FOIA Exemption 4 has spawned multiple circuit splits requiring certiorari review. Because this test underlies all of those splits, the easiest way to resolve them would be to review the first question presented, adopt the ordinary meaning of "confidential," and reject the substantial-competitive-harm test.

As previously explained, at least ten Circuits have adopted the substantial-competitive-harm test from *National Parks*, *see supra* p. 14, but they have been unable to consistently apply it. Courts' attempts to parse the D.C. Circuit's language, rather than the statute itself, have yielded splits on every facet of that test. See *N.H. Right to Life*, 136 S. Ct. at 383-385 (*National Parks* test is "nebulous," "convoluted," and "amorphous," with "different limits in different Circuits"). As the Department of Justice has recognized, without guidance from Congress or this Court, lower courts have "tended to resolve issues of competitive harm on a case-by-case basis rather than by

establishing general guidelines."[17] It takes forty-three pages for the Department of Justice's guide to Exemption 4 to explore dozens of opinions that have applied the substantial-competitive-harm test, including cataloguing courts' varying approaches, and the different outcomes that courts facing similar fact patterns have reached.[18]

National Parks' inability to generate consistent and predictable outcomes is further evidence that *National Parks* has been wrong all along. Instead of turning on a predictable standard, whether a private party's information must be released by the Government currently "rests on judicial speculation about whether disclosure will cause competitive harm." *N.H. Right to Life*, 136 S. Ct. at 384. The five circuit splits below provide illustrative, though not exhaustive, examples of these inconsistencies:

1. Importantly for the instant case, the Circuits disagree about what constitutes a likelihood of substantial competitive harm. The First and Tenth Circuits have held that "competitors' possible use of the information alone constitutes harm—*even if this would not likely result in any negative consequences for the entity whose information was disclosed.*" *N.H. Right to Life*, 136 S. Ct. at 384 (emphasis added) (citing *N.H. Right to Life* v. *Dep't of*

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[17] DOJ FOIA Guide at 309.

[18] *Id.* at 305-347. As further evidence of *National Parks*' systemic unpredictability, even panels within the same Circuit, reviewing the same facts, have been unable to apply consistently the substantial-competitive-harm test. *E.g.*, *id.* at 309 (reporting a case in which the D.C. Circuit originally affirmed the district court's determination that Exemption 4 applied but, upon reconsideration following a panel member's death, reversed and remanded on the same record—and observing that this case "well illustrate[s]" the "individualized and sometimes conflicting determinations indicative of competitive harm holdings" (citing *Greenberg* v. *Food & Drug Admin.*, 775 F.2d 1169, 1172-1173 (D.C. Cir. 1985), and *Greenberg* v. *Food & Drug Admin.*, 803 F.2d 1213, 1215, 1219 (D.C. Cir. 1986)).

Health & Human Servs., 778 F.3d 43, 51 (1st Cir. 2015)); see *State of Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (testimony that competitors might be able to use information to improve their bargaining positions established likelihood of substantial competitive harm, despite contention that this effect might be negligible). Petitioner met that standard here—USDA proved the information would likely be commercially useful in the competitive marketplace, App., *infra*, at 5a—and thus would have prevailed if respondent had been a newspaper in the First or Tenth Circuits.

The Eighth, Ninth, and D.C. Circuits, however, have required significantly more certainty and specificity, through a detailed showing that the disclosing party would suffer a "defined competitive harm (like lost market share) if competitors used the information." *N.H. Right to Life*, 136 S. Ct. at 384 (citing *McDonnell Douglas Corp.* v. *Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *GC Micro Corp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994)). The Eighth Circuit concluded that Exemption 4 did not apply because USDA's evidence that the requested information would allow competing "grocery retailers to make better decisions," "[a] likelihood of commercial usefulness" was "not the same as a likelihood of substantial competitive harm." App., *infra*, 5a.

2. The D.C. Circuit requires a showing of "actual competition" for Exemption 4 to apply. *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685-686 (D.C. Cir. 1976).[19] But "[c]ourts cannot seem to agree on what kind

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[19] The first *National Parks* panel remanded the case for further consideration in light of the newly-enunciated test, and the district court held two additional hearings. See *Nat'l Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 678 (D.C. Cir. 1976). The outcome of this second appeal was a harbinger of things to come: holding more evidence was needed to determine whether the substantial-competitive-harm

of 'actual competition' must be shown." *N.H. Right to Life*, 136 S. Ct. at 384. Some Circuits require "factual justifications and market definitions to show that there is 'actual competition in the relevant market' in which the entity opposing the disclosure of its information operates." *Ibid.* (citing *Watkins* v. *U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011)). Other Circuits "take an expansive view of what the relevant market is, and do not require any connection between that market and the context in which an entity supplied the requested information." *Ibid.* (citing *N.H. Right to Life*, 778 F.3d at 49-52).

3. The Circuits likewise disagree about whether "actual competition" can be shown based on the possibility of competition from a hypothetical future competitor, or only from a competitor who is already participating in the relevant market.

At least three Circuits will account for hypothetical future competitors. *E.g.*, *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 351-352 (D.C. Cir. 2018) (finding substantial competitive harm where the requested information would, among other things, help new companies enter the market); *N.H. Right to Life*, 778 F.3d at 51 (First Circuit finding that agency met its burden because a "potential future competitor could take advantage" of the information at issue, including in "different arenas"); *Sharkey* v. *Food & Drug Admin.*, 250 F. App'x 284, 289-290 (11th Cir. 2007) (finding substantial competitive harm in domestic market for vaccines based on giving international competitors or new domestic market entrants a competitive advantage).

The Fourth Circuit, in contrast, has taken a narrower

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test was met, the court of appeals partially reversed and remanded the case for yet a third determination. *Id.* at 687.

view and required the party resisting disclosure to show evidence of existing, non-hypothetical competition. *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (finding the prospect of future competitors too "speculative" to justify applying Exemption 4). And, at times, the D.C. Circuit too has concluded that evidence of "future or potential competition" is "legally inadequate under the *National Parks* standard." *Niagara Mohawk Power Corp.* v. *U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999).

4. Circuits have also reached different conclusions regarding whether bad publicity or "embarrassment" in the marketplace is the type of competitive harm against which Exemption 4 protects. The Second Circuit, for example, has upheld a finding of substantial competitive harm based on the possibility that competitors would use disclosed information to "embarrass" the submitter in the marketplace. See *Nadler* v. *FDIC*, 92 F.3d 93, 97 (2d Cir. 1996). But the D.C. Circuit has held that competitive harm caused by "[c]alling customers' attention to unfavorable agency evaluations or unfavorable press" can never be covered by Exemption 4. See *United Techs. Corp.* v. *U.S. Dep't of Def.*, 601 F.3d 557, 563-564 (D.C. Cir. 2010).

5. In addition to disagreement over how to define each term of the test, the D.C. Circuit's *Critical Mass* opinion modifying *National Parks* has created further fault lines. Under *Critical Mass*, the substantial-competitive-harm test applies in cases "in which a FOIA request is made for * * * information a person was *obliged* to furnish the Government," but a different definition of "confidential" controls when the information at issue was "provided to the Government *voluntarily*." 975 F.2d at 880 (emphases added).

To date, the voluntary/involuntary *Critical Mass* test has been adopted by the D.C. and Tenth Circuits. *State of*

Utah, 256 F.3d at 969. The First Circuit, in contrast, has declined to follow *Critical Mass*'s "lessened standard for voluntary submissions." *N.H. Right to Life*, 778 F.3d at 52 n.8. The Second, Fourth, and Ninth Circuits have, to date, also declined to adopt this standard, specifying however that the voluntary/involuntary distinction was not relevant to the outcome of the appeal before them, or had not been raised by the parties. See *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996). Thus, in the First Circuit, all "confidential" information sought to be withheld under Exemption 4 must undergo the *National Parks* analysis, whereas in the D.C. Circuit, only information that is "required" to be provided to the Government is subject to this test.

* * *

In sum, the Court should grant review of the first question presented to restore FOIA Exemption 4's plain text. Doing so would bring Exemption 4 into line with this Court's jurisprudence about statutory construction (generally and for FOIA specifically); it would also have the salutary effect of eliminating widespread confusion and multiple splits among the Circuits.

II. The Court Should At Least Grant Review Of The Second Question Presented And Resolve The Outcome-Determinative Circuit Split Presented On This Record

Even if the Court declines to repudiate the judicially-created *National Parks* test, the second question presented equally merits certiorari review so that the Court can resolve the outcome-determinative circuit split implicated on these facts. Petitioner would have prevailed in the First or Tenth Circuits, which require only that the

requested information could be potentially useful to a competitor; but the Eighth, Ninth, and D.C. Circuits have held that the disclosing party must make a detailed showing that the information will in fact result in a defined competitive harm, like lost market share. See *supra* pp. 25-26 (discussing this split).

Substantial evidence at trial showed how the requested SNAP redemption data would be useful to a competitor. USDA's fact witnesses explained that the release of store-level data would enable existing and potential future competitors to target the retailers' SNAP customers and estimate the total volume of sales at a given location. App., *infra*, 11a-12a. An expert witness walked the court, step-by-step, through how these competitors could apply this data to their competitive advantage. *Id.* at 13a.

Given this significant evidence, the Eighth Circuit concluded that USDA had proven that the requested data "might prove useful" to the retailers' competitors if it were released. App., *infra*, 5a. That showing would have been sufficient in the First and Tenth Circuits to prevent the disclosure of petitioner's information. See *N.H. Right to Life*, 778 F.3d at 51; *State of Utah*, 256 F.3d at 971. Nonetheless, the Eighth Circuit found this showing insufficient because "[a] likelihood of commercial usefulness—without more—is not the same as a likelihood of *substantial* competitive harm." App., *infra*, 5a (emphasis added). This case therefore squarely implicates the circuit split between the First and Tenth Circuits, versus the Eighth, Ninth, and D.C. Circuits.[20]

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[20] Further confirming the confusion spawned by the *National Parks* substantial-competitive-harm test, the Eighth Circuit could and should have reached a different conclusion based on its own prior precedent. In *Madel*, 784 F.3d at 453, a party invoked Exemption 4 and provided affidavits stating that information "could be used to determine the companies' market shares, inventory levels, and sales

This case is thus an excellent example of the widespread confusion among the Circuits in applying the *National Parks* substantial-competitive-harm test. This Court's review of either or both questions presented is warranted to address these exceptionally important questions regarding FOIA Exemption 4.

III. This Case Presents An Ideal Vehicle For Review Of FOIA Exemption 4 And Both Questions Presented

Though this Court has reviewed other FOIA exemptions—some several times—it has never interpreted Exemption 4. See *supra* p. 10. This case presents a clean vehicle for the Court to restore clarity to Exemption 4 and resolve the confusion in the Circuits. The Court's grant of petitioner's application to recall the Eighth Circuit mandate, App., *infra*, 82a, shows that a majority of the Court has already recognized that the case is likely worthy of certiorari review and likely warrants reversal.

No other issues cloud this case. The definition of "confidential" in Exemption 4 was the *only* issue decided in the judgment below. There is no dispute in this appeal that the requested information otherwise qualifies for protection under the exemption as "commercial or financial information obtained from a person." 5 U.S.C. § 552(b)(4). The Court can therefore narrowly focus on this question of statutory interpretation without having to resolve tangential or fact-laden issues related to the rest of the statute.

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trends in particular areas." Although the affidavits did not specify how each distributer actually would be affected beyond these generalities, *Madel* found that this was sufficient to prevent disclosure. *Ibid.* Although the panel below acknowledged that the issues in this case "appear to mirror" the issues in *Madel*, it cryptically declared that a different result was merited because the data in *Madel* was "not analogous to the data in this case." App., *infra*, 6a.

The *National Parks* test for "confidential" under FOIA Exemption 4 has been entrenched for years among the Circuits, and there is no indication that any Circuit can or will fix the confusion in this area. Thus, further percolation will not aid this Court's review, and there is no likelihood that the Circuits will resolve the interpretation of "confidential" on their own. Instead, the lower courts will continue to disregard the plain meaning of "confidential" and apply the *National Parks* test in myriad inconsistent ways.

The Court's resolution of one or both questions presented will be dispositive of this case. Undisputed evidence was presented at trial that retailers closely guard and keep store-level SNAP data secret. *See supra* p. 6. This information is therefore "confidential" under that term's plain meaning. Likewise, the outcome of this appeal in the Eighth Circuit would have been different, and petitioner would have prevailed, had the Eighth Circuit adopted the construction of likelihood of substantial competitive harm advocated by petitioner and embraced by at least the First and Tenth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1346

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: March 14, 2018
Filed: May 8, 2018

Before GRUENDER, BEAM, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

This case returns to us after a bench trial. Intervenor Food Marketing Institute (FMI) argues the district court[1] erred in finding that Exemption 4 to the Freedom of Information Act (FOIA) is inapplicable to data held by the U.S. Department of Agriculture (USDA).

Most of the relevant facts are set out in our previous opinion. See Argus Leader Media v. U.S. Dep't of Agric., 740 F.3d 1172,1173-75 (8th Cir. 2014). The data in question come from the Supplemental Nutrition Assistance Program (SNAP). The USDA issues SNAP participants a card (like a debit card) to use to buy food from participating retailers. When a participant buys food using their SNAP card, the USDA receives a record of that transaction, which is called a SNAP redemption. Argus Leader Media, a South Dakota newspaper, asked the USDA for annual SNAP redemption totals for stores that participate in the SNAP program (the "contested data"). The USDA refused, citing several FOIA exemptions. In our previous opinion, we held that Exemption 3 did not apply to the contested data, and remanded the case to the district court. Id. at 1176-77.

On remand the only issue was whether FOIA Exemption 4, which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), applies to the contested data. Argus Leader and the USDA agreed that the contested data were commercial or financial information, and that they were not privileged.[2] To show the contested data were "confidential," the USDA had to

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[1] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

[2] The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal.

prove that releasing the data was likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Madel v. U.S. Dep't of Justice, 784 F.3d 448, 452 (8th Cir. 2015) (quoting Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001)). The USDA argued only the competitive position prong, so the question before the district court was whether releasing the contested data was likely to cause substantial harm to the competitive position of SNAP retailers.

The case went to bench trial. Both parties called experts to testify about the risks of disclosing the contested data. In its findings of fact and conclusions of law, the district court adopted a definition of competitive harm from the D.C. Circuit: "[C]ompetitive harm may be established if there is evidence of 'actual competition and the likelihood of substantial competitive injury . . . .'" Argus Leader Media v. U.S. Dep't of Agric., 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (alteration in original) (quoting Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). Applying that standard, the district court found that the grocery retail industry was highly competitive, but that the USDA had not proved a likelihood of substantial competitive injury. Id. at 833-35. The court found the USDA's claims of competitive injury were "speculative at best" because grocery retailers already had access to large quantities of data about their competitors, and existing models explained the majority of grocery customers' behavior. Id. at 834. The court also found speculative the USDA's assertion that stores with high SNAP redemptions would face stigma. Id.[3]

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[3] In addition, the district court opined that stigma "is not relevant in an Exemption 4 analysis because it is not a harm caused by a

After the district court entered judgment for Argus Leader, the USDA decided not to appeal. FMI, a trade group representing grocery retailers, intervened and filed this appeal. FMI contests the district court's findings of fact and application of the law to those facts.[4] "We accept the district court's factual findings unless they are clearly erroneous, and we review the applicability of the FOIA exemption de novo." Peltier v. F.B.I., 563 F.3d 754, 762 (8th Cir. 2009).

As to the facts, we see no clear error. FMI argues that the district court erred in finding that release of the contested data would have little effect on the grocery industry, and failed to give enough weight to its assertions that releasing the data would stigmatize some stores and cause stores to stop accepting SNAP. But record evidence showed that the contested data—which are nothing more than annual aggregations of SNAP redemptions—lacked the specificity needed to gain material insight into an individual store's financial health, profit margins,

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competitor." Id. We need not determine the relevance, if any, of stigmatic injury in Exemption 4 cases because, as we explain, the evidence of stigma was insufficient to support a finding of substantial competitive harm alone or in combination with other evidence presented.

[4] FMI also argues in passing that the district court should not have used the D.C. Circuit standard to decide whether releasing the contested data is likely to cause substantial competitive harm. But FMI does not propose an alternate standard. Instead, it argues that the words of the statute—"privileged or confidential," 5 U.S.C. § 552(b)(4)—can be given their dictionary definitions. FMI asserts that "confidential" means "secret," so a record falls within Exemption 4 if it has previously been kept secret. We reject this argument as precluded by "the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed.'" Argus Leader, 740 F.3d at 1176 (quoting Milner v. Dep't of Navy, 562 U.S. 562, 565 (2011)). Under FMI's reading, Exemption 4 would swallow FOIA nearly whole.

inventory, marketing strategies, sales trends, or market share. FMI's assumption that stores would be stigmatized was speculative and not supported by any other evidence in the record. There was also no meaningful evidence that retailers would end their SNAP participation if the contested data were released.

Applying the law to the facts, we find no basis for reversal. The trial evidence showed that the grocery industry is highly competitive, but is already rich with publically-available data that market participants (and prospective market entrants) use to model their competitors' sales. The evidence shows that releasing the contested data is likely to make these statistical models marginally more accurate. But the evidence does not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm. The USDA's evidence showed only that more accurate information would allow grocery retailers to make better business decisions. If that were enough to invoke Exemption 4, commercial data would be exempt from disclosure any time it might prove useful in a competitive marketplace. A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm. We agree with the district court and conclude that the USDA failed to establish that release of the contested data falls within Exemption 4's ambit.

In an effort to avoid this conclusion, FMI cites to our opinion in Madel. In that case, we affirmed Exemption 4's application to Drug Enforcement Administration (DEA) records pertaining to oxycodone transactions by private companies. See Madel, 784 F.3d at 451-53 (noting that one of the requested documents "contain[ed] information traceable to individual manufacturers and distributors, such as market shares in specific geographic areas, estimates of inventories, and sales" for the entire nation-

wide market for oxycodone). We cited DEA declarations that the requested records "could be used to determine the companies' market shares, inventory levels, and sales trends in particular areas" which might allow competitors "to target specific markets, forecast potential business of new locations, or to gain market share in existing locations, thereby gaining competitive advantage." Id. at 453 (cleaned up). While these concerns appear to mirror those raised by the USDA in this case, Madel is distinguishable. In Madel, the data in question were sufficiently specific (records of individual companies' sales of a particular drug) that their release was likely to provide a tangible competitive advantage. The contested data in this case, by contrast, are more general, and add little to the information already available to retailers. Because the Madel data are not analogous to the data in this case, the result is different.[5]

For these reasons, we affirm the judgment of the district court.

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[5] We also note that Madel was decided on summary judgment. The government is entitled to summary judgment when its "affidavits provide specific information sufficient to place the documents within the exemption category, *if* this information is not contradicted in the record." Id. at 452 (emphasis added) (quoting Quiñon v. FBI, 86 F.3d 1222, 1227 (D.C. Cir. 1996)). In Madel, the party seeking disclosure did not submit any evidence to rebut the government's proffer. Id. at 453.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 05/08/18)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

Before GRUENDER, BEAM and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 08, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

MEMORANDUM OPINION
AND ORDER

Plaintiff, Argus Leader Media, brings this Freedom of Information Act (FOIA) suit against defendant, United States Department of Agriculture (USDA). Argus seeks data on the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. The USDA opposes releasing the data based on FOIA Exemption 4, arguing that such disclosure would cause substantial competitive harm to grocery stores participating in SNAP. This court disagrees and holds that disclosure of the requested data will not cause

substantial competitive harm to SNAP retailers. The data should be disclosed under FOIA.

BACKGROUND

The USDA administers SNAP through the Food and Nutrition Service, an agency within the USDA. The purpose of SNAP is to give children and needy families access to food and nutrition education. When SNAP households redeem their benefits, the transaction looks like a customer using a debit card. The SNAP household pays for its groceries by swiping a benefits card and entering a PIN number. A third-party processor verifies that the SNAP account has available benefits and then approves or denies the transaction. If the transaction is approved, the third-party processor then transfers money from the SNAP household's account to the retailer's bank and sends the redemption data to the Food and Nutrition Service.

Argus, in 2011, made a FOIA request to the Food and Nutrition Service. Argus sought a variety of SNAP data–including yearly spending totals at individual retail locations. About two weeks later, the Food and Nutrition Service provided some of the requested information and withheld the remainder citing FOIA Exemptions 3 and 4. Argus then filed an administrative appeal. Before the USDA formally denied the appeal, Argus filed this action.

The USDA, in 2012, filed its first motion for summary judgment. This court granted the USDA's motion and held that Exemption 3 of FOIA applied to the undisclosed data. The Eighth Circuit Court of Appeals reversed and remanded the case. In 2015, the USDA filed its second motion for summary judgment, arguing FOIA Exemptions 4 and 6 applied to the requested data. This court denied the motion and scheduled the case for a bench trial. Before trial, the USDA withdrew its Exemption 6 argument, and the parties stipulated that the only issue

remaining for the court to decide was whether Exemption 4 applied to yearly SNAP revenues for individual stores.

The bench trial began on May 24, 2016. A number of Food and Nutrition Service employees testified about the collection of SNAP data. Witnesses also testified about the potential harm in disclosing the requested data, including the USDA's witness Joey Hays. Hays is the President and Owner of Dyer Foods Incorporated, a supermarket chain that started in Dyer, Tennessee and has expanded to 13 locations. Hays has spent 35 years in the grocery business. Hays testified that individual store SNAP sales data is not public information and that release of the data would cause competitive harm to his business because competitors could use the information against him. On cross examination, however, Hays admitted that releasing the SNAP data would not give competitors a store's total profits. Hays also admitted that much of a store's business is already visible to the public such as product selection and price. Hays further testified that Wal-Mart has already saturated his market, even without the requested SNAP information.

Andrew Johnstone, Associate General Counsel for Sears Holdings Management Corporation, also testified for the USDA. Johnstone echoed Hays's comments that the grocery business is especially competitive because the profit margins are low. Johnstone testified that if the requested SNAP data was disclosed it would help competitors take away business from Kmart stores. Finally, Johnstone noted the potential stigma that might result from publishing SNAP data. Specifically, Johnstone was concerned that landlords would not renew their lease agreements if the data showed that KMart stores had high SNAP sales. On cross examination, Johnstone testified that store data is already publically available to market researchers. Such data includes a store's location, products, and pricing. Johnstone also

testified that if the SNAP information was released, it would be released regarding all SNAP retailers.

Peter Larkin, President and CEO of the National Grocers Association, testified that profit margins in the grocery industry are roughly 1% before tax. He also testified that a 2014 study found profit margins to be $0.0091 on every dollar. Thus, grocery stores must have a high sales volume to make a profit. Larkin also testified that individual store SNAP data is not available currently to the public, and Larkin reasoned that injecting new sales information into the public domain could impact stores because competitors could target high dollar SNAP locations and build new stores in that area. On cross examination, Larkin admitted that a number of factors play a role in a customer's decision to shop at a grocery store such as better produce, convenient location, unique products, or better customer service. Larkin also testified that disclosing SNAP data would not be the same as disclosing a store's profits or net sales.

Gwen Forman, Senior Vice President of Marketing at Cumberland Farms, theorized that SNAP data is valuable because it confirms whether or not a store's practices are successful. Although the public sees a store's advertising and customer outreach, a competitor cannot confirm whether the store's strategy is effective. Releasing SNAP data—Forman argues—allows competitors to gauge whether a store's marketing strategy is effective. On cross examination, Forman admitted that a number of other factors also determine whether a store is ultimately successful at a given location. SNAP data alone will not determine a store's future plans or business strategy.

Argus's first witness was Dr. Richard Volpe, an Assistant Professor in the Agribusiness Department at California Polytechnic State University. Dr. Volpe testified that a variety of store data is already public. For

example, a store's prices, level of activity, layout, and assortment of products are visible to anyone visiting the store. This data is already being collected and is available to retailers. Dr. Volpe also addressed concerns about benchmarking, the practice of analyzing a store's sales over a period of years. Dr. Volpe explained a benchmarking analysis of SNAP data has limited value because a store's increased SNAP revenue may be attributable to a number of factors such as increased prices, change in customer demographics, or increased number of SNAP customers. Because additional data is necessary to determine the reason for increased SNAP sales, the release of individual store SNAP data would not cause competitive harm.

Argus's next witness was Dr. Ryan Sougstad, Associate Professor of Business Administration at Augustana University. Dr. Sougstad testified about how companies use data to come to decisions. Dr. Sougstad testified that individual retailer SNAP data would not likely play a significant role in helping businesses decide where to locate stores. On cross examination, Dr. Sougstad admitted that he was unable to determine to what degree stores would be less profitable if the requested SNAP data was released, but he believed any economic harm would be marginal.

The USDA's one rebuttal witness, Bruce Kondracki, Vice President of Market Insights and Consumer Research at Dakota Worldwide Corporation, testified about market analysis in the food industry. Kondracki explained that grocery stores use model forecasts to determine where to add locations and that releasing SNAP data could improve the accuracy of these models. Kondracki also testified that the addition of new stores does not necessarily mean customers quit frequenting their current store, but customers may spend less money at their current store.

LEGAL STANDARD

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993). "The government bears the burden of proving by a preponderance of the evidence that a withheld document falls within one of the exemptions." *Enviro Tech Int'l, Inc. v. U.S. EPA*, 371 F.3d 370, 374 (7th Cir. 2004) (citing § 552(a)(4)(B)). This court has made all of its factual determinations by a preponderance of the evidence.

DISCUSSION

The exemption at issue here is FOIA Exemption 4. The Eighth Circuit Court of Appeals has explained that "[t]he plain language of [Exemption 4] exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975) (internal

quotation omitted). Neither party has argued that the requested SNAP data is a trade secret, so the issue before the court is whether the requested FOIA information is (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential. The parties have stipulated that the information is commercial or financial, so only the remaining two elements are discussed below.

A. The SNAP information is obtained from a person.

The Supreme Court has explained that information is "obtained from a person" if the "information [is] obtained outside the Government." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979). In *FCC v. AT&T*, 562 U.S. 397, 408-09 (2011), the Supreme Court held a corporation was a person under Exemption 4 analysis. Argus asserts that because SNAP is a government program, the requested SNAP data is obtained from inside the government. The government is giving SNAP benefits to qualifying households, and the government then tracks where the SNAP households are spending their benefits. Argus contends that the government is essentially keeping track of its own spending. Thus, Argus's position is that all of the redemption data is generated and collected by the government and that the SNAP data is obtained from the government.

The Eighth Circuit Court of Appeals has already held that Exemption 3 does not apply to this case In that opinion, the Eighth Circuit held that the requested information is "'obtained' from third-party payment processors, not from individual retailers." Docket 44 at 6 (citations omitted). This conclusion is supported by the testimony from the Food and Nutrition Service employees. Neither party disputes that it is the third-party processor who verifies whether the SNAP household has available SNAP benefits and that the third-

party processor submits the redemption data to the Food and Nutrition Service. Based on the Eighth Circuit's ruling and the testimony at trial, this court finds that the requested information is obtained from a person, namely the third-party processors who facilitate the SNAP transactions.

B. The SNAP information is not privileged or confidential.

Information is confidential if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[1] This test, which the Eighth Circuit Court of Appeals adopted from the District of Columbia Court of Appeals, is commonly known as the *National Parks* test and "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.* Because the parties agree that prong 1 of the *National Parks* test is inapplicable, only prong 2 is addressed. Docket 61 at 19-20.

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[1] Another test is used if the person or entity submitting information is acting voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under Exemption 4 because the bid must be submitted in order to win the contract); *see also* Defendant's Memorandum in Support of Motion for Summary Judgment, Docket 61 at 19 (stating "[T]he agency's position is that the information here is required to be submitted.")

The Eighth Circuit Court of Appeals has not articulated the showing necessary for a party to prove that release of information would cause substantial harm under prong 2. But the District of Columbia Circuit has found that prong 2 competitive harm may be established if there is evidence of "actual competition and the likelihood of substantial competitive injury . . . ." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (internal quotation omitted).[2] Competitive harm is limited to "harm flowing from the use of proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Id.* n. 30. When assessing the potential for competitive harm, a court may consider the nature of the material sought, the competitive circumstances surrounding the disclosure, and credible opinion testimony. *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976). Although a party opposing disclosure "need not 'show actual competitive harm,'" conclusory and generalized allegations—standing alone—are not sufficient. *Food & Drug Admin.*, 704 F.2d at 1291.

1. Actual competition

Competition in the grocery business is fierce. This conclusion is supported by the testimony of Joey Hays, Andrew Johnstone, Peter Larkin, Gwen Forman, and Bruce Kondracki. Johnstone noted that competition in the grocery business has increased with the entrance of new competitors, and Larkin provided testimony that the profit margins in the grocery industry are at $0.0091 on

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[2] *See also Sharkey v. Food & Drug Admin.*, 250 Fed. Appx. 284, 288 (11th Cir. 2007).

every dollar spent. Kondracki also explained competition is not measured solely in terms of lost customers, but in lost dollars to other stores. Kondracki testified the entrance of a new store into an existing market can cause a significant loss in business. Based on this testimony, the court finds that the grocery industry has actual competition.

2. Likelihood of substantial competitive harm

The competitive harms alleged by the USDA fall into two main categories: (1) harms arising from competitors using SNAP data to lure away customers from other businesses and (2) harms arising from the potential stigma associated with being a high volume SNAP retailer. Forman's testimony encapsulated the retailers' overarching concerns of the former. Forman explained how competitors could use SNAP data to choose the locations of new stores, evaluate an existing store's overall success, and ultimately cut into another store's profits. Hays, Johnstone, Larkin, and Kondracki all gave testimony supporting this conclusion that disclosure of individual store redemption data could cause competitive harm because competitors in the grocery business could use the information to target an existing store's customers.

This analysis, however, is incomplete. Competitors in the grocery industry already use a variety of publicly available information to make decisions. This information includes a store's location, layout, pricing, product selection, and customer traffic. Dr. Volpe and Dr. Sougstad both noted that while SNAP information may provide some insight into a store's overall financial health, the data is a small piece in a much larger picture—disclosure would have a nominal effect on competition in the grocery industry. Kondracki's models of consumer behavior appear to support this point. Kondracki testified

that the current market models can reach correlations of .9 or .99. This appears to indicate that while SNAP data may be beneficial, it would not add significant insights into the grocery industry. This conclusion is further supported by the testimony of Hays. Hays testified that competitors such as Wal Mart have already saturated the market where he competes. Wal Mart took these actions without the requested SNAP data. This court concludes that any potential competitive harm from the release of the requested SNAP data is speculative at best.

The second concern the USDA voiced to releasing SNAP data was the potential stigma SNAP households and SNAP retailers might face. As noted above, this type of harm is not relevant in an Exemption 4 analysis because it is not a harm caused by a competitor. Even if stigma was relevant, the USDA's evidence on potential stigma was not sufficient to meet its burden. Although Johnstone testified that high SNAP sales revenue might affect a landlord's decision to rent its commercial space to a retailer, it seems unlikely that a landlord would be unaware of its tenant's customer base. Johnstone also did not provide any evidence of the likelihood of this contingency occurring. At best, Johnstone's claims are speculative. Furthermore, the remaining witnesses did not explain how high or low SNAP sales would harm their stores. For example, although a high volume of SNAP sales might encourage a competitor to enter that geographical market, an equally compelling conclusion is that the competitor may decide to stay away from that market. Another equally compelling conclusion is that SNAP sales will have no or little effect on a store's decision to expand into new sites. This is because a variety of factors influence a store's decision to open a new location including: cost of real estate, location of real estate, the business's long-term financial plan and goals, and other

factors. This court finds that the competitive harms associated with stigma are also speculative.

The USDA, in its post-trial reply brief, cited three cases to support its claim that releasing the requested SNAP data would cause competitive harm. Each case, however, is distinguishable from the present litigation because the plaintiffs in the other cases asked for data that would give greater insights into the company's workings. In *Kleppe*, 547 F.2d at 379-80, plaintiffs sought information about company assets, liabilities, net worth, balance sheet information, future and existing projects, and operating capacity. In *Public Citizen Health Research Group*, 209 F. Supp. 2d at 40-41, plaintiffs requested the negotiated royalty rates between private researchers and the government. Finally, in *Sharkey v. Food & Drug Administration*, 250 Fed. Appx. 284, 288-290 (11th Cir. 2007), plaintiffs sought information that would result in the disclosure of domestic market share and sales volume. Here, the requested SNAP data does not provide the same insights into store profitability. SNAP sales are merely a part of the store's total revenue. SNAP data does not disclose a store's profit margins, net income, or net worth. SNAP data also does not disclose how a company bids on government contracts or negotiates with the federal government. In essence, SNAP data is merely a bill from the retailer to the government. As the USDA acknowledges, this type of data is regularly disclosed, and disclosure is consistent with FOIA's underlying purpose. Docket 125 at 5-6. Because of the speculative nature of the USDA's claims and FOIA's preference for transparency and disclosure, this court finds that the release of SNAP data will not likely cause substantial competitive harm to SNAP stores. The data should be disclosed.

CONCLUSION

The USDA has failed to meet its burden to show that Argus's FOIA request falls within Exemption 4 because the USDA did not prove that release of the requested data was confidential. Specifically, USDA did not show that release of the requested information would cause substantial competitive harm if it was disclosed. Thus, it is

ORDERED that judgment will be entered in favor of Argus and against USDA in accordance with this memorandum opinion and order.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the court's Memorandum Opinion and Order, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiff, Argus Leader Media, d/b/a Argus Leader, and against defendant, United States Department of Agriculture.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this claim under the Freedom of Information Act (FOIA) to obtain information in the possession of defendant, the United States Department of Agriculture (USDA). Docket 1. After USDA provided some, but not all, of the requested information, Argus Leader requested that a *Vaughn* Index be filed to explain why USDA did not provide the withheld information. Docket 12. USDA resists that motion and claims that a *Vaughn* Index is not necessary because USDA offered detailed affidavits that

sufficiently explained its decision to withhold the information. Docket 15. USDA also moves for summary judgment and argues that its decision to withhold redemption data was appropriate in this case because the material was protected under exemption 3 to the FOIA and should not be released. Docket 18. Argus Leader resists that motion and requests that the redemption data be disclosed because that information is not what Congress meant to exempt under the claimed statute. Docket 33. For the following reasons, USDA's motion for summary judgment is granted.

BACKGROUND

The relevant facts of this dispute, viewed in the light most favorable to the nonmoving party on the motion for summary judgment, Argus Leader Media, d/b/a Argus Leader, are as follows:

On February 1, 2011, Argus Leader emailed a request for specific records to the email address for the Food and Nutrition Service (FNS), which is an agency of the USDA. USDA enforces the Food and Nutrition Act of 2008 (FNA or the Act) in addition to other statutes. The information that Argus Leader requested related to the Supplemental Nutrition Assistance Program (SNAP), or what was formerly known as the food stamp program. The request sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 22 ¶ 11.

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses

While FNS administers the FNA and its regulations and standards, the Benefit Redemption Division (BRD) is the component within FNS that oversees the EBT system. Through the EBT system, SNAP recipients receive an EBT debit card that keeps track of their monthly benefits and is the object that gives them access to food and other qualifying items under SNAP. BRD also ensures that only those retailers that qualify to participate in SNAP do so, and it regulates the retailers who are not in compliance with the regulations and policies designated under the program. BRD is responsible for maintaining the EBT system in a manner that ensures it is responsive to its clients, the states it serves, and the federal government.

The specific requested data still at issue is redemption data—all other data was provided to Argus Leader or was deemed nonessential by Argus Leader. Redemption data is the dollar amount of goods that each retailer sells to SNAP beneficiaries and subsequently redeems from the federal government in a given year. It is one type of information that is generated and stored in a technology system overseen by BRD, which is called the Store Tracking and Redemption System (STARS). Redemption data is "only obtained when a retailer is authorized to accept SNAP cards and processes a SNAP transaction." Docket 21 ¶ 20. Redemption data, however, is only generated for each retailer during the time frame that the retailer would be authorized to participate in SNAP. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Docket 21 ¶ 21.

After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS

SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the Freedom of Information Act Exemptions 3 and 4 and 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader submitted its appeal of FNS's decision to withhold the redemption data, which was filed with the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was working its way through the federal system and was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint on August 26, 2011, and the denial of Argus Leader's appeal was never sent. Docket 1. Argus Leader moved for a *Vaughn* Index on March 5, 2012. Docket 12. USDA responded to that motion and stated that its reasons for the denial of specific

discovery were already expressed in the documents submitted in this case, and a *Vaughn* Index was not necessary. Docket 15. USDA also moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties reached a stipulation that the issue of FNS numbers was no longer relevant, and the only issue before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3. Docket 33.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either "by citing to particular parts of

materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts, and inferences drawn from those facts, are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a Freedom of Information Act case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985) (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983))). "Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." *Mace v. E.E.O.C.*, 37 F. Supp. 2d 1144, 1146 (E.D. Mo. 1999) (citations omitted). *See also Nielsen v. U.S. Bureau of Land Mgmt.*, 252 F.R.D. 499, 503 (D. Minn. 2008) ("Summary judgment is the preferred procedural vehicle for resolving FOIA disputes.") (citing *Evans v. U.S. Dep't of Personnel Mgmt.*, 276 F. Supp. 2d 34, 37 (D.D.C. 2003)).

DISCUSSION

Argus Leader first argues that it is entitled to a *Vaughn* Index to understand USDA's explanation for the withholding of redemption data. USDA claims that the affidavits and other supporting documents have sufficiently stated its reasoning for denying the FOIA material, that the exemption being claimed is clear, and that an index is unnecessary. Argus Leader also claims that exemption 3 does not apply in this case because USDA cannot show that the claimed statute is a withholding statute or that the redemption data is the type of information that Congress meant to withhold under the claimed statute. USDA argues that § 2018(c) is clearly a withholding statute and that redemption data is information within the purview of 7 U.S.C. § 2018(c); therefore, the requested data was properly withheld under exemption 3.

I. *Vaughn* Index

Argus Leader argues that it is entitled to a *Vaughn* Index, which is a detailed list or index of the material withheld by USDA and usually contains a precise rationale of the reasons for withholding. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). "Although there are instances where *Vaughn* index may be necessary for proper review, a *Vaughn* index is not required as a matter of course." *May v. I.R.S.*, Civ. No. 90-1123, 1991 WL 328041, at *2 (W.D. Mo. 1991) (citing *Barney v. I.R.S.*, 618 F.2d 1268, 1272 (8th Cir. 1980)). *See also Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen the affidavit submitted by an agency is sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required . . . Moreover, when a FOIA requester has sufficient information to present a full legal argument, there is no need for a *Vaughn* index.").

> The typical *Vaughn* Index:
>
> provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

Mo. Coal., 542 F.3d at 1209-10 (quoting *In re Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993)). *Vaughn* indices serve two purposes: (1) "to ensure an 'effectively helpless' party's right to information 'is not submerged beneath governmental obfuscation and mischaracterization,' " and (2) "to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.' " *Mo. Coalition*, 542 F.3d at 1209 (citing *Vaughn*, 484 F.2d at 826).

"Generally, a more substantial *Vaughn* index-one that provides for each document requested a specific explanation as to why an exemption applies–is preferable to a bare bones index." *Mo. Coalition*, 542 F.3d at 1210. Although courts routinely conduct an in camera review of the documents at issue, such inspection should be limited because it is " 'contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly produced in court.' " *Barney*, 618 F.2d at 1272 (quoting *Cox v. U.S. Dep't of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978)). "If the material is fairly described and the reason for nondisclosure is adequately stated and supported by the law, the agency's position should be upheld without in camera inspection." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

When analyzing whether an exemption to FOIA applies:

> A court's primary role . . . is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position . . . . If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

Barney, 618 F.2d at 1272 (citing Cox, 576 F.2d at 1312). A *Vaughn* Index is not mandatory, but "[i]f the Court cannot evaluate the propriety of the claimed exemptions on the record before it, it may order the agency to submit more detailed affidavits or a *Vaughn* index, or even review documents *in camera*." *Gavin v. U.S. Sec. & Exch. Comm'n*, Civ. No. 04-4522, 2006 WL 2975310, at *2 (D. Minn. Oct. 16, 2006) (citing *Barney*, 618 F.2d at 1272; *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 n.2 (9th Cir. 1997); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). "Boilerplate or conclusory affidavits, standing alone, are insufficient to show that no genuine issue of fact exists as to the applicability of a FOIA exemption." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

The affidavits submitted in this case by Susan Modine, Jennifer Weatherly, and Andrea Gold described redemption data in detail—how it is gathered, used, and why it should remain withheld. USDA specifically stated which exemptions to FOIA prevented disclosure and also discussed 7 U.S.C. § 2018, the statute that enumerates why the redemption data must be protected. And the

remaining data associated with the redemption data, like store name and other identifiers, was already provided to Argus Leader. Moreover, this is the type of case where a *Vaughn* Index would not improve Argus Leader's specific factual understanding of the documents sought because both parties know what is sought, and the redemption information is not a mystery to the agency or the requester. The information is a monetary amount that is redeemed each year for the grocery or wholesale food store in question. This is not the sort of information where a *Vaughn* Index would give the requester useful information that would help with the litigation because the information is a number and nothing more.[2]

The affidavits and briefs in support of USDA's motion were sufficient information for Argus Leader to make its legal argument and sufficient to aid the court in its legal determinations in this case. *See Mo. Coalition*, 542 F.3d at 1210 ("Such an index allows both the district court and the requesting party to evaluate the decision to withhold records and ensure compliance with FOIA."); *see also Miller*, 779 F.2d at 1387 (finding that an agency meets its burden by offering affidavits that explain why the documents were subject to an exemption). For these reasons, Argus Leader's request for a *Vaughn* Index is denied because it is unnecessary and duplicative in this case.

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[2] Because the information requested, redemption data, is one number for each store, the court finds that this information is not the type that is segregable. "In every case, the district court must make an express finding on the issue of segregability." *Missouri Coalition*, 542 F.3d at 1212 (citations omitted). The court finds that USDA already provided to Argus Leader the information that could be separated without triggering protection under the exemption and that the redemption data was reasonably separated from the remainder of the information at that time.

Now the court will analyze whether USDA properly withheld the redemption data under exemption 3, whether 7 U.S.C. § 2018 is properly classified as a withholding statute, and if redemption data is intended to be withheld under that statute.

II. Freedom of Information Act

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enforcement Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, ___ U.S. ____, 131 S. Ct. 1259, 1262 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 131 S. Ct. at 1262. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[3] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

The exemption presently at issue is commonly known as FOIA exemption 3. This exemption exempts from disclosure matters that are precluded from release by another statute, if that statute either:

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[3] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

5 U.S.C. § 552(b)(3)(A). "When determining whether FOIA exemption 3 is applicable, the court first decides if a statute is a withholding statute and then determines 'whether the information sought after falls within the boundaries of the non-disclosure statute.'" *Cent. Platte*, 643 F.3d at 1146 (quoting *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 332 (D.C. Cir. 1987)). "Exemption 3 is different from other FOIA exemptions because 'its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.'" *Id.* (citing *Goland v. C.I.A.*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

USDA argues that 7 U.S.C. § 2018, which discusses the approval of retailers' participation in SNAP, is the withholding statute applicable to this case. The Eighth Circuit Court of Appeals has not expressly ruled upon whether § 2018 qualifies as an exempting or withholding statute under the two-part criteria mandated by § 552(b)(3), nor have any other district courts within the Eighth Circuit or elsewhere. First, the court must determine whether § 2018 is properly characterized as a withholding statute.

A. Withholding Statute

Because the court must determine whether the statute is a withholding statute that meets the requirements of exemption 3, the focus is whether there is clear language

within § 2018 that "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or provides criteria for withholding the information. 5 U.S.C. § 552(b)(3)(A)(i)-(ii). "To determine whether a statute is a withholding statute that prohibits disclosure, the court looks at the language of the statute on its face." *Zanoni v. U.S. Dep't of Agric.*, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (citing *Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987)). The language of the statute at issue provides:

> (c) Information submitted by applicants; safeguards, disclosure to and use by State agencies
>
> **Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter.** The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. **Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the**

> **provisions of this chapter** or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C.A. § 1786], for purposes of administering the provisions of that Act [42 U.S.C.A. § 1771 et seq.] and the regulations issued under that Act. **Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.** The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

7 U.S.C. § 2018(c) (emphasis added).

The specific section that states that "[a]ny person who publishes, divulges, discloses, or makes known . . . any information obtained under this subsection shall be fined . . . or imprisoned[,]" directs that disclosure of information is prohibited and gives little discretion to the

agency as to how the information can be disseminated. 7 U.S.C. § 2018(c). Further, the language that gives the agency authority to promulgate regulations purports "to provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection[.]" Additionally, the only time that it is acceptable to release information obtained under the statute is if it is either for administrative or enforcement purposes or to investigate criminal activity. That restriction and the statutory language that discusses safeguarding or punishment for releasing information is the type of language that, on its face, is indicative of a withholding statute. *See* 5 U.S.C. § 552(b)(3) (requiring "that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]").

Additionally, Argus Leader does not specifically deny that § 2018 qualifies as a withholding statute; rather, its focus is that redemption data is not the type of information that was meant to be withheld under § 2018. Argus Leader admits that the language within § 2018 "arguably suffices to cross the Exemption 3's threshold." Docket 33 at 8. This admission, coupled with the plain language of the statute, leads to the conclusion that § 2018 would qualify as a withholding statute under exemption 3. The next inquiry is whether the yearly redemption data is the sort of information that Congress meant for USDA to withhold under the plain language of § 2018.

B. Information Within the Scope of Withholding Statute

Second, the court must determine whether the information sought after falls within the boundaries of the non-disclosure statute. The language of the statute at issue states that those food retail stores or wholesale food

concerns that wish to participate in SNAP must "submit information, which may include relevant income and sales tax filing documents[.]" 7 U.S.C. § 2018(c). It is immediately following this language that the first mention of withholding of information occurs within the statute. "Regulations issued pursuant to this chapter shall provide for safeguards which *limit the use or disclosure of information* **obtained** *under the authority granted by this subsection* to purposes directly connected with administration and enforcement of the provisions of this chapter . . .," except information provided to Federal or state law enforcement and investigative agencies. 7 U.S.C. § 2018(c) (emphasis added). The statute then describes the criminal punishment for any person who discloses, publishes, divulges, or makes known "*any information* **obtained** under this subsection."

The type of information that is to be withheld under the plain language of the statute is *any information*, which can include "relevant income and sales tax filing documents," that the federal government receives from a SNAP participant or a verifying agency or source. Thus, the precise question is whether redemption data or the amount of money that each store makes through SNAP purchases would satisfy any of these types of "information" noted in the statute or information that was obtained from a verifying agency via § 2018 authority.

Redemption data is the amount of SNAP benefits that are redeemed at a store in a given year, thus, the amount of money that the United States government credits to that retailer's bank account in a given year. SNAP beneficiaries have an EBT card, which acts similar to a debit card to purchase eligible food at certain stores authorized by FNS. For a transaction to occur, the customer swipes the EBT card in a point-of-sale device just like a debit card and enters a four-digit personal identification number. Docket 20 ¶ 9. The retail clerk

enters the amount of the purchase into the point-of-sale device and as long as the customer has sufficient balance to cover the cost, that amount is deducted[4] from the customer's EBT-SNAP account.

SNAP redemption data is either gathered by state EBT vendors or by subcontractors who provide the service. Docket 21 ¶¶ 19-20. State EBT vendors track and monitor SNAP benefit accounts, process any transactions, and eventually facilitate payment to the retail locations. Docket 21 ¶ 20. EBT vendors send files of all SNAP transactions to FNS, and retailers are identified solely by their unique FNS number. This information is loaded in the STARS database for sorting and filing and becomes the official record or redemption data for each retailer. Docket 21 ¶ 20. Soon after the customer's initial purchase, usually within two days, that same amount is credited to the retailer's bank account as redemption for the sale. Docket 20 ¶ 9. "This credit to the retailer's bank account is what" is known as redemptions. Docket 20 ¶ 9.

The way that FNS and other federal agencies use redemption data is to monitor compliance by participating retailers because excessive redemption amounts could be indicative of potential participation violations or could be a cause for sanctions. Docket 21 ¶ 21. FNS also uses redemption data to identify and remove retailers that are no longer actively participating in SNAP. "Redemption records are also an important element in the overall process of reconciling federal funds expended for SNAP."

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[4] The point-of-sale device communicates with a processor to electronically verify that the FNS number, or the unique identifier for that retailer within the SNAP and STARS database, is active and valid and that the customer has a sufficient balance to cover the purchase. Docket 21 ¶ 18. If either the FNS number is invalid or the balance is insufficient, then the transaction is denied at the point-of-sale. If both are accepted, then the transaction is authorized.

Docket 21 ¶ 21. Redemption data is inherently tied to FNS numbers or the unique identifying number assigned to retailers by FNS. All redemption data is attached to the retailer via that FNS number and the number is needed to process the original transaction and its subsequent repayment. Docket 21 ¶ 21.

USDA claims that "SNAP redemption data may only be disclosed as allowed by statute and that disclosure is limited to use connected with administration and enforcement of the provisions of the FNA or regulations issued pursuant to the FNA." Docket 21 ¶ 21. At specific points, the language of § 2018 refers to *any* information, or information obtained under the subsection, or "relevant income and sales tax filing documents." Redemption data is more than likely included under all three of those descriptions.

The language of § 2018 requires that applicants in SNAP submit information, including relevant income and sales tax filing documents, that allows the government to determine if the applicant qualifies or continues to qualify for participation in the SNAP program. This type of information, especially to determine if a retailer *continues* to qualify for SNAP participation, includes the amount of income (redemption data) each retailer derived from SNAP and the federal government. The government also has to verify tax information, which includes yearly income such as the redemption amount or benefits redeemed and paid to each retailer by the government. Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella. Because § 2018 is a withholding statute and redemption data is the type of information reached by the plain language of the statute, it was appropriate for USDA to withhold said data under

exemption 3 in light of the fact that the Argus Leader is not a state or federal law enforcement agency and was not conducting an internal agency audit.

Argus Leader argues that the redemption data is not included under § 2018 because that information is collected by state or outside businesses, who then send it to USDA and its subsidiaries to insert into the STARS system. Argus Leader claims that because the information is not provided by the retailers who are applicants for new or continued participation in SNAP, it is not included as "information" under § 2018. Argus Leader also asserts that because there is no request for redemption data on the application form for SNAP participation, the redemption data is outside the purview of the statute and not exempt under exemption 3. The court disagrees. As previously discussed, redemption data is the type of information that can be obtained under the authority of § 2018. The amount of EBT benefits a store provides or for which it is reimbursed is the type of information that retailers give to the federal government to continue its participation in SNAP or to renew its previously expired participation.

Because Congress established narrow criteria for when information under § 2018 could be released and redemption data is included under Congress's broad description of what constitutes "information" under § 2018, the redemption data was properly withheld. There are no genuine disputes of material fact. The court finds that USDA's decision to withhold the requested information was reasonable and exemption 3 applies; therefore, summary judgment is appropriate.

C. Legislative History

The court can also consider the legislative history of § 2018 in its consideration of whether the redemption data is the type that is meant to be withheld under exemption

3. *See N.L.R.B.*, 437 U.S. at 223-34 (looking to the legislative history to confirm the court's observation regarding the application of an exemption to FOIA). The legislative history of § 2018, which was amended in 1994 to expand the release of otherwise withheld information to law enforcement entities only, lends additional support to the court's conclusion that the redemption data was properly withheld.

Before the 1994 amendment to the Food Stamp Act of 1977, release of information under § 2018 was extremely restrictive. The purpose of the amendment was to "permit[] the use and disclosure of information provided by stores to State and Federal law enforcement and investigative agencies for the purposes of administering or enforcing the Food Stamp Act or any other Federal or State law and establishes penalties against persons who misuse any of the information[.]" Food Stamp Program Improvements Act of 1994, Pub. L. No. 103-225, H.R. Rep. No. 103-352, 1994 U.S.C.C.A.N. 39, 40. Prior to the 1994 amendment, the use of any of that information was restricted "to persons directly connected with the administration and enforcement of the Food Stamp Program" or those who administered WIC. *Id.* This language further demonstrates that all types of information that relate to tax, income, or redemption data that is correlated with participation in SNAP is to be withheld in all instances except internal administrative purposes or for law enforcement's use.

Under the plain language of § 2018, not only is the statute a withholding statute, but Congress intended to exempt redemption data from disclosure. For that reason, USDA has carried its burden and shown that exemption 3 applies to this case, and the agency properly withheld information that was covered under one of the narrow exemptions to the FOIA. *See Ray*, 502 U.S. at 173 ("Consistent with this purpose, as well as the plain

language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents."). There are no genuine issues of material fact in dispute, and summary judgment is appropriate.

CONCLUSION

Because USDA submitted detailed affidavits and briefs in support of its motion for summary judgment that justified its denial of the release of the redemption data records, the court finds that it is unnecessary and duplicative to require USDA to submit a *Vaughn* Index under the facts of this case. USDA has shown that § 2018 is a withholding statute under exemption 3 to the Freedom of Information Act. The plain language of the statute and its legislative history also indicates that redemption data is the type of information that was meant to be withheld under § 2018. USDA's decision to withhold the information was proper. Accordingly, it is

ORDERED that Argus Leader's motion for a *Vaughn* Index (Docket 12) is denied.

IT IS FURTHER ORDERED that USDA's motion for summary judgment (Docket 18) is granted.

Dated September 27, 2012.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the Order Granting Defendant's Motion for Summary Judgment, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendant, United States Department of Agriculture, and against plaintiff, Argus Leader Media, d/b/a Argus Leader.

Dated September 27, 2012.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3765

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: October 23, 2013
Filed: January 28, 2014

Before RILEY, Chief Judge, COLLOTON and KELLY, Circuit Judges.

RILEY, Chief Judge.

Formerly known as the Food Stamp Program, the Supplemental Nutrition Assistance Program (SNAP or program) is one of America's largest and fastest-growing welfare arrangements: between 2007 and 2011, spending "more than doubled . . . from about $30 billion to $72 billion."[1] Amid increasing public scrutiny of this burgeoning program, a Sioux Falls, South Dakota, newspaper called the Argus Leader (Argus) wondered how much money individual retailers received from taxpayers each year through the program. Invoking the federal law meant to bring disclosure sunlight to the government bureaucracy, Argus requested this spending information from the U.S. Department of Agriculture (department or USDA) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Cf. Louis D. Brandeis, Other People's Money 92 (1914) ("Sunlight is said to be the best of disinfectants."). With little explanation, the department refused disclosure.

After an internal administrative appeal proved fruitless, Argus brought a FOIA suit in the District of South Dakota. The department moved for summary judgment, contending the information was exempt from disclosure under 5 U.S.C. § 552(b)(3)—known as FOIA Exemption 3—and 7 U.S.C. § 2018(c). Looking to legislative history and accepting the department's statutory interpretation, the district court found the spending information exempt from disclosure and granted the department's motion. Argus appeals. Concluding the statutory text plainly precludes the department from

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[1] Congr. Budget Office, The Supplemental Nutrition Assistance Program 5 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/04-19-SNAP.pdf.

shielding the spending information under Exemption 3, we reverse.

I. BACKGROUND

The Food Stamp Act of 1964, Pub. L. No. 88–525, 78 Stat. 703, launched the program with a $75 million appropriation in its first year, rising to $200 million in its third. See id. § 16(a), 78 Stat. at 709. In fiscal year 2012, the program's total cost exceeded $78 billion, with more than 46 million people—over fifteen percent of the U.S. population—receiving benefits.[2] Most benefits go to needy families: 76 percent of SNAP households include "a child, an elderly person, or a disabled person" and "these households received 83 percent of all benefits."[3] An estimated $858 million per year is "trafficked," meaning "SNAP recipients sell their benefits for cash at a discount to food retailers," and approximately ten percent of participating retailers engage in trafficking.[4]

A. Administrative Proceedings

On February 1, 2011, Argus sent a letter to the department requesting "yearly redemption amounts, or EBT sales figures, for each store" participating in the program between fiscal years 2005 and 2010.

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[2] See Food & Nutrition Service (FNS), SNAP Monthly Data (Nov. 8, 2013), http://www.fns.usda.gov/pd/34SNAPmonthly.htm; FNS, SNAP Annual Summary (Nov. 8, 2013), http://www.fns.usda.gov/pd/SNAPsummary.htm; see also Phil Izzo, Food-Stamp Use Rises; Some 15% Get Benefits, Wall St. J., Aug. 9, 2013, http://blogs.wsj.com/economics/2013/08/09/food-stamp-use-rises-some-15- of-u-sgets-benefits.

[3] FNS, USDA, Characteristics of SNAP Households: Fiscal Year 2011, at xv (2012), available at http://www.fns.usda.gov/sites/default/files/2011Characteristics.pdf.

[4] USDA, The Extent of Trafficking in the SNAP: 2009-2011, at ii (2013), available at http://www.fns.usda.gov/sites/default/files/Trafficking2009.pdf.

Beneficiaries receive an electronic benefit transfer (EBT) card, which functions like a debit card. To use the card at a participating retailer, beneficiaries swipe their EBT card and enter a four-digit personal identification number at checkout. As with any other debit card transaction, a third-party processor deducts the transaction amount from the beneficiary's account and credits it to the retailer's account. Such third-party processors "handle and track [program] benefit accounts," then send transaction data to the department. Although the days when retailers had to redeem physical food stamps have long passed, the department still refers to this electronic process as a "redemption." After receiving transaction data from the third-party processors, the department loads each retailer's aggregated data into a government database.

The department appears to concede that it could use this database to supply the information requested by Argus. The department simply refuses to do so. In an undated letter received February 17, 2011, the department revealed the names and addresses of all participating retailers, but withheld "all other information . . . under 5 U.S.C. [§] 552(b)(3) and (b)(4)." In a letter dated February 25, 2011, Argus appealed this withholding. The department denied the appeal in another undated letter.

B. Article III Proceedings

On August 26, 2011, Argus filed a complaint under 5 U.S.C. § 552(a)(4)(B) in federal court seeking to compel the department to provide the withheld information. The department moved for summary judgment, invoking Exemption 3, 5 U.S.C. § 552(b)(3).

On September 27, 2012, the district court granted the department's motion. First, the district court decided 7 U.S.C. § 2018 qualified as a withholding statute under

Exemption 3. Second, the district court found the retailer spending information was exempt from disclosure because it was "the type of information that can be obtained under the authority of § 2018"—though, in practice, it is not obtained from the individual retailers. (Emphasis added). Consulting legislative history, the district court thought a 1994 amendment to § 2018 "demonstrate[d] that all types of information that relate to tax, income, or redemption data that is [sic] correlated with participation in [the program] is to be withheld in all instances except internal administrative purposes or for law enforcement's use." The district court determined the department was entitled to withhold the data. Argus appeals, invoking our jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

We "perform[] a *de novo* review of the grant of summary judgment in a FOIA case." Mo. ex rel. Garstang v. U.S. Dep't of Interior, 297 F.3d 745, 749 (8th Cir. 2002). A government agency is not entitled to summary judgment in a FOIA case unless "the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985). "In order to discharge this burden, the agency 'must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is *wholly exempt* from the Act's inspection requirements.'" Id. at 1382-83 (emphasis added) (quoting Nat'l Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

A. Statutory Text

"Our analysis begins, as always, with the statutory text." United States v. Gonzales, 520 U.S. 1, 4 (1997). The

relevant text of FOIA Exemption 3 allows agencies to withhold information that is

> *specifically exempted* from disclosure by statute (other than [5 U.S.C. § 552b]), if that statute—
>
> (A)(i) *requires* that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) *establishes* particular criteria for withholding or refers to particular types of matters to be withheld[.[5]]

5 U.S.C. § 552(b)(3) (emphasis added). The department contends the spending information is "specifically exempted" by 7 U.S.C. § 2018(c). Argus does not dispute that § 2018(c) is a withholding statute (i.e., one that "requires," "establishes," or "refers" to non-discretionary or particular withholding of information).

Instead, Argus challenges the district court's conclusion that program spending information falls within the withholding contemplated by § 2018(c). Again, we look to the relevant statutory text:

> (c) Information *submitted by applicants*; safeguards; disclosure to and use by State agencies
>
> Regulations issued pursuant to this chapter shall require *an applicant retail food store or wholesale food concern to submit information*, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to *whether such applicant qualifies, or continues to qualify*, for approval . . . . Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of

[5] There is one additional requirement not applicable to this case.

> *information obtained under the authority granted by this subsection* . . . . Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any *information obtained under this subsection* shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

7 U.S.C. § 2018(c) (emphasis added).

Because the retailer spending information is not "submit[ted]" by "an applicant retail food store or wholesale food concern," id., the information is not exempt from disclosure. The department, not any retailer, generates the information, and the underlying data is "obtained" from third-party payment processors, not from individual retailers. See, e.g., Brian A. Garner's Modern American Usage 74 (3d ed. 2009) (defining "obtain" as "to get, acquire"); Webster's Third New Int'l Dictionary 1559 (1993) (defining "obtain" as "to gain or attain possession or disposal of"). Neither of the forms used to determine whether a given retailer "qualifies" or "continues to qualify" as a program participant asks for the spending information. These plain textual reasons for rejecting the department's position mean we need not rely on the Supreme Court's admonition that FOIA exemptions "must be 'narrowly construed,'" Milner v. Dep't of Navy, 562 U.S. ____, ____, 131 S. Ct. 1259, 1262 (2011) (quoting FBI v. Abramson, 456 U.S. 615, 630 (1982)), to conclude retailer spending information is not "obtained under the authority granted by" § 2018(c).

Our plain reading is further confirmed by the subsection heading, which refers to "Information *submitted by applicants*." 7 U.S.C. § 2018(c) (emphasis added). A subsection "heading cannot substitute for the operative text of the statute." Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008). But

"statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" Id. (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002)). Even if the statutory text left any ambiguity, the heading would resolve that doubt in favor of disclosure.

The district court's contrary conclusion stemmed from a misreading of the statute. First, the district court singled out the term "any information," interpreting the statute to require withholding of all information—regardless of its source—used to determine whether "a retailer qualifies or continues to qualify for participation in the [program]." Yet the statute makes clear that only information obtained under § 2018(c)—submitted by a retailer—is exempted. When the statute says "obtained" it means "obtained," not "can be obtained," as the district court reasoned. (Emphasis added). "Congress expresses its purpose by words. It is for [courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort." 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951). Here, however else the spending information could be obtained, the department actually obtained it from third-party payment processors, not the retailers themselves.

Second, the district court thought the spending information qualified as "relevant income and sales tax filing documents." The district court opined, "Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella." Again, the district court departed from the plain text of the statute, which refers to "income and sales tax *filing documents*." 7 U.S.C. § 2018(c) (emphasis added). These words—confirmed by the requirement to "provide written authorization for the Secretary to verify all relevant tax

filings with *appropriate agencies*"—plainly refer to tax documents filed with relevant state, local, and federal tax authorities. Id. (emphasis added). Echoing the Supreme Court, we "have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (internal quotation omitted); see, e.g., Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc., 651 F.3d 857, 862 (8th Cir. 2011). The spending information is not a tax filing document, so the district court's "broad umbrella" cannot shade the spending information from the sunlight.

B. Statutory History

Although "the authoritative statement is the statutory text, not the legislative history," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), we recognize that the district court relied in part on the legislative history. While resolving this case purely on textual grounds, we observe "for those who find legislative history useful," United States v. Tinklenberg, 563 U.S. ____, ___, 131 S. Ct. 2007, 2015 (2011), that this history is more fairly read to support Argus' position.

First, Congress has clearly indicated its intent to involve the public in counteracting fraud perpetrated by retailers participating in the program. See, e.g., Food Stamp and Commodity Distribution Amendments of 1981, Pub. L. No. 97–98, § 1314, 95 Stat. 1213, 1285 (codified as amended at 7 U.S.C. § 2018(e)).

Second, the statutory history reveals that redemptions were historically governed not by § 2018(c), but by an entirely different section: 7 U.S.C. § 2019. See Food Stamp Act of 1977, Pub. L. No. 95–113, sec. 1301, § 10, 91 Stat. 913, 969 (codified as amended at 7 U.S.C. § 2019).

Thus, Congress apparently never expected the department to obtain redemption data, used to generate the requested spending information, "under the authority granted by [§ 2018(c)]." 7 U.S.C. § 2018(c).

Noting the history of § 2018(c) but relying on its plain text, we conclude Exemption 3 cannot prevent Argus from "pierc[ing] the veil of administrative secrecy and . . . open[ing] [the department's] action[s] to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotation omitted).

III. CONCLUSION

We reverse and remand for further proceedings consistent with this opinion.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3765

(Filed 01/28/14)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 28, 2014

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 09/30/15)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this action under the Freedom of Information Act (FOIA) against defendant, United States Department of Agriculture (USDA), seeking disclosure of information related to the Supplemental Nutrition Assistance Program (SNAP), formerly known as the food stamp program. Docket 1. USDA moves for summary judgment and argues that its decision to withhold information is supported by exemptions 4 and 6 to the FOIA. Docket 61. Argus Leader resists USDA's motion and argues neither

exemption applies. Docket 73. For the following reasons, USDA's motion for summary judgment is denied.

BACKGROUND

The facts viewed in the light most favorable to Argus Leader are as follows:

On February 1, 2011, Argus Leader made a FOIA request for documents from the Food and Nutrition Service (FNS), which is an agency of the USDA. FNS administers the Food and Nutrition Act of 2008 and other federal statutes designed to facilitate the operation of SNAP. Argus Leader's request for information sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 60 at 3. At this point in the litigation, Argus Leader only seeks information about the yearly redemption amounts paid to each participating store. All other data was either provided to Argus Leader or deemed nonessential by Argus Leader.

The Benefit Redemption Division (BRD), a component within FNS, oversees an EBT system which allows SNAP beneficiaries to use their SNAP benefits at participating retailers. Through the EBT system, BRD is able to track each SNAP beneficiary's account and ensure that each retailer is paid for SNAP purchases. The EBT system functions like other debit cards. A SNAP beneficiary is given an EBT card. At checkout, the SNAP beneficiary

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

swipes his or her EBT card on the store's point-of-sale device. The device then communicates with a processor and electronically verifies that the retailer is a SNAP participant and that the SNAP beneficiary has a sufficient balance in his or her account to cover the purchase. If the retailer is not a SNAP participant or there are insufficient funds in the beneficiary's account, the transaction is denied at the point-of-sale.

All of the SNAP payment information that is generated is stored in a technology system overseen by BRD called the Store Tracking and Redemption System (STARS). Redemption data is obtained only when a retailer is authorized to accept SNAP cards and processes a SNAP transaction. Redemption data is generated for each retailer only during the time frame that the retailer would be authorized to participate in SNAP. The STARS system keeps track of the total amount of EBT dollars spent at a participating SNAP retailer in a given year. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Argus Leader seeks to recover this store specific data.

On February 1, 2011, Argus Leader made its request for documents from FNS. After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the FOIA exemptions 3 and 4, codified at 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed

Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader appealed FNS's decision to withhold the redemption data to the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint in this court on August 26, 2011, and the denial of Argus Leader's administrative appeal was never sent. Docket 1. USDA moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties stipulated that the issue of FNS numbers was no longer relevant and the only issue remaining before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment with regard to the remaining issue and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3 to the FOIA. Docket 33. The court ruled in favor of USDA and found that exemption 3 applied to the requested data. On March

25, 2014, the Eighth Circuit Court of Appeals reversed and held that exemption 3 did not apply. Docket 44.

After the Court of Appeals' ruling, the USDA published a request for information in the Federal Register on August 4, 2014. FNS contacted SNAP retailers to determine whether SNAP retailers thought disclosure of aggregated SNAP redemption data for individual stores should be disclosed. Of the 321,988 potential SNAP retailers contacted, only 323 responded, and 73 percent of respondents were opposed to disclosing individual store redemption data.

USDA followed up with fifteen SNAP retailers that filed affidavits stating why individual store redemption amounts should not be disclosed. Affiants stated the disclosure of individual store data could cause predatory competition, put a stigma on SNAP retailers, and cause other commercial harms. After receiving this data, USDA filed its second motion for summary judgment arguing that exemptions 4 and 6 to the FOIA applied to the requested information. Docket 58; Docket 61.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v.*

Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either by "citing to particular parts of materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts and inferences drawn from those facts are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a FOIA case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute and to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1209 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985)).

DISCUSSION

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S.

562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[2] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

I. Exemption 4

USDA argues it is not required to disclose yearly redemption amounts for individual SNAP retailers because such information would be "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit Court of Appeals has explained that exemption 4 applies to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975). Information is confidential if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the

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[2] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

information was obtained." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[3] This test, which the Eighth Circuit Court of Appeals adopted, is commonly known as the *National Parks* test. This test "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.*

In its most recent opinion about exemption 4, the Eighth Circuit Court of Appeals stated, "To claim an exemption [under exemption 4], an agency must 'provide affidavits which justify the claimed exclusion of each document by correlating the purpose for exemption with the actual portion of the document which is alleged to be exempt.'" *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015) (quoting *Miller*, 779 F.2d at 1387 (8th Cir. 1985)). "[G]eneralized allegations cannot establish that disclosure of financial reports would cause substantial competitive harm." *Contract Freighters*, 260 F.3d at 863. If each element of the exemption is not met, then the exemption does not apply.

When viewing the facts in a light most favorable to Argus Leader, summary judgment must be denied. Under the *National Parks* test, USDA must show that disclosure of an individual store's yearly redemption data is likely "to cause substantial harm to the competitive position" of the individual store. Because USDA received a small percentage of responses from SNAP retailers,

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[3] Another test is used if the person or entity submitting information is doing so voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under exemption 4 because the bid must be submitted in order to win the contract).

there is evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data. A reasonable fact-finder could also find that a number of factors influence marketplace competition and that simply disclosing the amount of EBT dollars spent at a particular location is not sufficient to influence the marketplace. Because there is a reasonable dispute as to whether the disclosure of individual store redemption data is likely to cause substantial competitive harm to SNAP retailers, summary judgment is denied.[4]

II. Exemption 6

USDA further argues that exemption 6 applies to at least "individual retailer redemption data of sole proprietor and closely held corporations . . . ." Docket 61 at 31. Under 5 U.S.C. § 552(b), government agencies may decline to disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As explained by the Eighth Circuit Court of Appeals, the heart of the analysis is a balancing test between "the privacy interest of the individual against the public interest in disclosure." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1185 (8th Cir. 2000); *see also Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229-33 (D.C. Cir. 2008) (using a four step analysis that balances the individual's privacy interest against the public's interest in disclosure). USDA argues disclosure of individual store redemption data could reveal private information about "at least a portion of the owner's personal finances" and that disclosure could

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[4] It should be noted that the disclosure of individual store redemption data may not affect each store in the same way. For example, disclosing individual store data to the public could benefit certain SNAP retailers. Therefore, USDA must specifically state how the disclosure of SNAP data could adversely affect specific stores.

also cause competitive harm to these businesses. Docket 61 at 33 (quoting *Multi Ag Media*, 515 F.3d at 1229-30). USDA also argues that such disclosure outweighs the public's interest because the public already has access to redemption data broken down into region, state, county, and zip code (when available). *Id.* at 35.

When viewing the facts in the light most favorable to Argus Leader, summary judgment cannot be granted. There is evidence that the public's interest in disclosure outweighs the individual's privacy. For example, disclosure of individual store redemption data does not disclose individual finances because the data would not disclose what percentage of the retailer's sales are credited to SNAP or how much the retailer profits after deducting expenses. *See Multi Ag Media*, 515 F.3d at 1229-33. Additionally, as stated above, a reasonable fact-finder could conclude that there is no threat of competitive harm with the disclosure of individual store data. Also, there is a great public interest in full disclosure of the parameters of the SNAP program. When weighing the interests of retailers against the public's interest in a transparent government, the latter prevails. Thus, summary judgment is denied as to exemption 6.

CONCLUSION

Because questions of fact remain on the issues of whether substantial competitive harm is likely if individual store redemption data is disclosed and whether individual privacy interests outweigh the public's interest in a transparent government, summary judgment is denied. Accordingly it is

ORDERED that USDA's motion for summary judgment (Docket 58) is denied.

Dated September 30th, 2015

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 01/30/17)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant,

FOOD MARKETING INSTITUTE,

Intervenor.

ORDER GRANTING EMERGENCY MOTION TO INTERVENE, STAY JUDGMENT, AND EXTEND TIME TO FILE AN APPEAL

Intervenor, Food Marketing Institute (FMI), brings this emergency motion to intervene in this litigation, to stay the court's November 30, 2016 judgment, and to extend the deadline to file a notice of appeal. Argus has

responded to FMI's motions, and the court grants FMI's motions.

BACKGROUND

Argus Leader Media filed a complaint on August 26, 2011, seeking data on the Supplemental Nutrition Assistance Program (SNAP) that is administered by the United States Department of Agriculture (USDA). Docket 1. USDA opposed disclosure of the requested data. The issue before this court was whether Argus was entitled to the data under the Freedom of Information Act (FOIA). During the course of litigation, USDA filed its first motion for summary judgment, limiting its argument to FOIA Exemption 5. Dockets 18 and 23. The court granted USDA's motion and entered judgment in favor of USDA. Dockets 38 and 39. Argus appealed the court's ruling, and the Eighth Circuit Court of Appeals reversed this court's decision and remanded the case for further proceedings. Dockets 44 and 45.

USDA then filed its second motion for summary judgment, arguing that FOIA Exemptions 4 and 6 applied to Argus's request for SNAP data. Dockets 58 and 61. USDA later withdrew its contention that FOIA Exemption 6 applied. Docket 99 at 1. The court denied USDA's motion for summary judgment. Docket 80. On May 25, 2016, the court began a bench trial on whether Exemption 4 applied to Argus's request. Dockets 99 and 111. Following trial, the court ruled on November 30, 2016, that FOIA Exemption 4 did not apply. Dockets 127 and 128. Throughout the litigation of this case, USDA has argued that Argus's request for SNAP data should be denied.

On January 19, 2017, USDA notified SNAP-authorized retailers that, based on the court's judgment, USDA will disclose the requested SNAP information to Argus. Docket 139 at 2. Members of the Food Marketing

Institute (FMI)—who are also authorized SNAP retailers—now object to USDA's release of the SNAP data. *Id.* FMI moves to intervene in this case and requests that the court stay its judgment and extend the deadline to file an appeal. Docket 138.

MOTION TO INTERVNE

FMI seeks to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Because the court grants FMI's motion on these grounds, the court does not address FMI's argument that it may permissively intervene under Federal Rule of Civil Procedure 24(b)(1)(B).

I. LEGAL STANDARD

For a party to intervene in litigation, the party must establish Article III standing and satisfy the requirements of Rule 24. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)). To establish Article III standing, a party "must clearly allege facts showing an injury in fact, which is an injury to a legally protected interest that is 'concrete, particularized, and either actual or imminent.'" *Id.* at 834 (citing *Curry v. Regent of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999)). "An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Owner–Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 831 F.3d 961, 967 (8th Cir. 2016) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

A party has a right to intervene in litigation under Rule 24 if the following criteria are met: "(1) [the party] has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (citing *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997)).

Rule 24 also requires that the party file a timely motion. Fed. R. Civ. P. 24. To determine whether a motion is timely, the court considers (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1094 (8th Cir. 2011) (citing *United States v. Ritchie*, 620 F.3d 824, 832 (8th Cir. 2010); *see also United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995)).

II. DISCUSSION

A. Article III standing

In *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (2016), the Eighth Circuit Court of Appeals addressed the requirements for standing for associations. The court held that the American Farm Bureau Federation and the National Pork Producers Council had standing to challenge the release of their members' personal data under FOIA. *Id.* at 968. The Eighth Circuit reasoned that the federal government's "nonconsensual dissemination of personal information" was a sufficient basis to establish a "concrete and particularized injury in fact," giving the associations standing. *Id.* at 968.

Based on *Farm Bureau*, this court finds that FMI has established Article III standing. Similar to the associations in Farm Bureau, FMI has shown that its members would otherwise have standing to sue in their own right because of the potential nonconsensual dissemination of private information. The private nature of the information and its potential disclosure gives FMI members a concrete, particularized legal interest to protect. FMI has also shown that the interests it seeks to protect are germane to FMI's purpose. FMI is an organization that "advocates for food retailers" and "their commercial interests," and the release of SNAP data directly impacts those commercial interests. Docket 139 at 4. Lastly, FMI has shown that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. FMI is appealing the application of a FOIA exemption, and the court is able to rule on the application of the exemption without testimony of FMI members. For these reasons, FMI has established Article III standing.

B. Rule 24(a)(2) requirements

FMI has also met the requirements of Rule 24(a)(2). FMI's motion is timely because the association only recently discovered that USDA would not be appealing this court's ruling. Although much of the litigation has already been completed, FMI's interests were sufficiently represented by USDA. It was not until USDA decided to refrain from filing an appeal that FMI needed to intervene. Nothing about the litigation up to this point would have changed if FMI had been a party from the outset. Because FMI has a valid reason for its delay in seeking intervention and no prejudice will result, the court finds that FMI's motion is timely. Furthermore, FMI has an interest in the subject matter of this litigation because its members are directly impacted by the release of the

requested SNAP information. FMI's interest in protecting its members' financial data would be impaired by USDA's decision to disclose the data and not appeal this court's ruling, and USDA no longer represents FMI's interests because USDA plans to release the requested SNAP data. Because both the requirements of Article III and Rule 24 are met, FMI may intervene in this case.

MOTION TO STAY JUDGMENT

I. LEGAL STANDARD

When ruling on a motion for a stay pending appeal, the court must consider (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) the threat of irreparable harm to the moving party absent a stay; (3) whether issuance of a stay pending appeal would substantially injure the other parties in the proceeding; and (4) the effect on the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Iowa Utils., Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.1996). The Second Circuit Court of Appeals and the Sixth Circuit Court of Appeals have recognized that "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). Or "[s]imply stated, more of one excuses less of the other." *Id.* (quoting *Griepentrog*, 945 F.2d at 153; *cf. In re Reval AC, Inc.*, 802 F.3d 558, 569-73 (3d Cir. 2015) (finding factors are interconnected).

II. DISCUSSION

The issue before the court was whether FOIA Exemption 4 applied to individual SNAP retailer redemption data. The issue appears to be one of first impression in the Eighth Circuit Court of Appeals.

Because there is not a clearly established answer to this issue, FMI could succeed in an appeal. The disclosure of the requested SNAP data could also cause irreparable harm to FMI members—that is the issue FMI seeks to appeal. And once the data is disclosed, it cannot be unseen. In contrast, Argus and the public will not suffer irreparable harm if the data is not disclosed immediately. Assuming Argus prevails on appeal, Argus will have access to the SNAP data and will be able to publish news articles based on the information. Any harm would be temporary and not irreparable. Based on these considerations, the court grants FMI's motion to stay judgment.

Federal Rule of Civil Procedure 62(d) also states that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond." Here, FMI's motion to stay judgment and desire to appeal directly impacts the litigation expenses Argus must incur. Because Argus may be able to recover attorney fees if it prevails on appeal, this court orders that FMI post a $20,000 bond. The stay will take effect upon posting of the bond.

MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

FMI moves for a 30-day extension to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(A). Because FMI did not learn of its need to intervene in this case until January 19, 2017, good cause exists to give FMI a 15-day extension to file its appeal.

CONCLUSION

This court grants FMI's motion to intervene because FMI has established Article III standing and has met the

requirements of Rule 24(a)(2). The court stays its judgment in this case pending review by the Eighth Circuit Court of Appeals because of the potential irreparable harm disclosure of the requested information could cause FMI members, and FMI is required to post a $20,000 bond. The court also grants FMI's motion for a 15-day extension to file an appeal.

DATED this 30th day of January, 2017.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/07/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Appellant's motion to stay the mandate, appellee's response and appellant's reply have been considered by the court and the motion is denied.

August 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX L

Supreme Court of the United States

No. 18A146

FOOD MARKETING INSTITUTE,

Applicant

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 17-1346, is hereby recalled and stayed pending further order of the undersigned or of the Court. It is further ordered that a response to the application be filed on or before Thursday, August 16, 2018, by 4 p.m. The reply, if any, is to be filed by 4 p.m., Tuesday, August 21, 2018.

/s/ Neil M. Gorsuch
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of August 2018.

APPENDIX M

(ORDER LIST: 585 U.S.)

WEDNESDAY, AUGUST 29, 2018

ORDER IN PENDING CASE

18A146 FOOD MARKETING INST. V. ARGUS LEADER MEDIA

The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17-1346 is recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/29/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of
South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Pursuant to an order of the U.S. Supreme Court, dated August 29, 2018, the mandate is hereby recalled and stayed pending the disposition of a petition for writ of certiorari.

August 29, 2018

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 07/13/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. 11-4121

ARGUS LEADER MEDIA, dba ARGUS LEADER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Excerpts from Transcript of Court Trial held May 24-25, 2016, before the Honorable Karen E. Schreier, U.S. District Court Judge, at the U.S. District Courthouse in Sioux Falls, South Dakota

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APPEARANCES:

MR. JON E. ARNESON, Attorney at Law, 123 S. Main Avenue, Suite 202, Sioux Falls, South Dakota 57104, appearing on behalf of the Plaintiff.

MS. STEPHANIE C. BENGFORD, U.S. Attorney's Office, P.O. Box 2638, Sioux Falls, South Dakota 57101-2638, appearing on behalf of the Defendant.

MR. DAVID K. GASTON and MS. CHU-YUAN HWANG, U.S. Department of Agriculture, 1400

Independence Avenue, S.W., Room 3311, Washington, DC 20250, appearing on behalf of the Defendant.

* * *

[230] MR. ARNESON: So competition is good for America, but not too much competition?

MR. JOHNSTONE: I don't think I'm saying that. I'm saying that information that we consider proprietary and confidential that we submitted to the [231] Government, with the understanding that it would be kept confidential, we're concerned that the release of that will cause us substantial competitive harm. You can say that that's the impact of the free market, if that's your view. All I can say is we are concerned about what we think the likely negative effects are of the release of the information, which is information we keep confidential and we don't disclose to anyone.

MR. ARNESON: Okay. I would agree then that -- let me see if I can state this. You're saying that the Kmart attitude is this information is proprietary, confidential, secret. Yet, is it not the payment under a Government program?

MR. JOHNSTONE: It is.

* * *

[291] MS. BENGFORD: And so then its actual SNAP sales individual store data, you believe that's a key piece?

MR. LARKIN: Absolutely.

MS. BENGFORD: And why is that?

MR. LARKIN: Because anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do

everything they can to capture for that percentage, whatever they can, out of that dollar amount.

[292] In today's world, they have ways of guessing. They have ways of estimating. They have market research they can do. But there is no place where they can get the actual data. And when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released.